In the Supreme Court of the United States

No. 69

OCTOBER TERM, 1921

RENSSELAER L. CURTIS, RECEIVER,
Complainant, Appellant,

v.

JOHN J. CONNLY ET AL.,
Respondents, Appellees.

BRIEF FOR APPELLANT.

EDWARD F. MCCLENNEN,
161 DEVONSHIRE STREET,
BOSTON, MASSACHUSETTS,

GEORGE H. HUDDY, JR.,
49 WESTMINSTER STREET,
PROVIDENCE, RHODE ISLAND,

Attorneys for Appellant.

OCTOBER, 1921.

INDEX AND SUMMARY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921. No. 69.

RENSSELAER L. CURTIS, RECEIVER,
Complainant, Appellant,

v.

JOHN J. CONNLY ET AL.,
Respondents, Appellees.

BRIEF FOR APPELLANT.

This is an appeal from the final decree, March 4, 1920, of the Circuit Court of Appeals for the First Circuit affirming the decree of the District Court of the United States for the District of Rhode Island, dismissing the Bill of Complaint as to the six respondents, on motion to dismiss, on the ground that the suit is barred by the Statute of Limitations of Rhode Island, namely, General Laws of Rhode Island, Chapter 284, Section 3.

The appeal to the Supreme Court lies under Judicial Code, Sections 241, 128, because the source of original jurisdiction is the character of the suit and not diversity of citizenship.

Lovell *v.* Newman & Son, 227 U. S. 412.

The bill was filed August 2, 1916, by the appellant, the Receiver of the Atlantic National Bank, to recover from the former directors of the bank for the loss sustained by the bank because of dividends paid out of capital and because of improper loans and investments made by the directors (par. 35, p. 172; par. 18, p. 8; par. 20, p. 9; par. 27, p. 169), with knowledge that they were improper (par. 19, p. 9; par. 26, p. 169; par. 29, p. 170; par. 65, p. 196).

Three of the appellees ceased to be directors, January 12, 1909, and three, January 11, 1910, nineteen months and seven months, respectively, in excess of six years before the bill was filed.

The appellees concealed the cause of action (pars. 38, 39 and 40, p. 173; pars. 183–191, pp. 218–221), and it was not discovered until 1913, and in part until 1915 (par. 40, p. 174).

The appellant contends that the Statute of Limitations is not a bar; *first,* because of the concealment; and *second,* because, irrespective of concealment, the directors, as knowing and positive wrongdoers in a fiduciary position, cannot set up the Statute of Limitations for any period prior to disclosure by them of the cause of action or discovery thereof by the parties wronged.

In more detail the errors assigned are:

ASSIGNMENT OF ERRORS (Record, p. 253).

First. No discovery or disclosure of the existence of the cause of action to the Atlantic National Bank of Providence, R. I., would have any effect upon the bar of the Statute of Limitations unless that discovery occurred before August 3, 1910, six years before this suit was begun, — August 2, 1916, — and therefore the knowledge acquired by directors after August 3, 1910, and the number of directors who first became such after August 3, 1910, was immaterial to the question before the Court, but the Court in its opinion disregards this.

Second. Only three new directors were added to the board after the defendants ceased to be directors and before August 3, 1910, and the Court in its opinion disregards this fact.

Third. The Court in its opinion erroneously assumes that the new directors knew before August 3, 1910, of the wrongs committed by the defendants.

Fourth. The knowledge acquired by the several new directors did not, before August 3, 1910, amount to discovery by the bank.

Fifth. The misrepresentations made on the books of the bank and in the false reports to the comptroller, to the stockholders and to the general public relative to matters during the time in which the defendants were directors, did not cease to be misrepresentations when the defendants ceased to be directors, and the Court in its opinion speaks otherwise.

Sixth. The Court failed to give due effect to the allegations of fact in the Bill of Complaint, and particularly to the allegations of fact in the 38th to the 40th and in the 183d to the 191st paragraphs setting forth that each of these six defendants had fraudulently by actual misrepresentations concealed the existence of the cause of action in this suit and that it was first discovered within six years prior to the filing of this Bill of Complaint.

Seventh. The Court in its opinion has assumed the existence of facts as to the discovery of the cause of action and opportunity therefor contrary to the allegations of fact in the Bill of Complaint, and particularly to the allegations of the 40th and of the 186th paragraphs.

Eighth. The Court failed to give effect to the law that if a cause of action is once fraudulently concealed by the defendants by actual misrepresentations, the time fixed by the Statute of Limitations as a bar does not begin to run as a defense to it until the existence of the cause of action is discovered by the party entitled to enforce it.

Ninth. The Court failed to give effect to the law that the time fixed by the Statute of Limitations as a bar does not begin to run as a defense for the directors of a national bank sued for positive acts knowingly done by them in violation of their fiduciary duties to the bank until the cause of action is disclosed by them or is discovered.

Tenth. The Court should not have decreed that the Statute of Limitations constituted a defense for these six defendants or any of them, and should not have affirmed the decrees dismissing the Bill of Complaint as to them.

Eleventh. If the decrees of the District Court appealed from were not final within the terms of the statutes governing appeals, then the dismissal of the appeal should be without prejudice.

FIRST.

No Discovery or Disclosure of the Existence of the Cause of Action to the Atlantic National Bank of Providence, R. I., would have Any Effect upon the Bar of the Statute of Limitations unless that Discovery Occurred before August 3, 1910, Six Years before this Suit was Begun, — August 2, 1916, — and therefore the Knowledge Acquired by Directors after August 3, 1910, and the Number of Directors who First Became Such after August 3, 1910, was Immaterial to the Question before the Court, but the Court in its Opinion Disregards This.

The only applicable Statute of Limitations is that of Rhode Island.

McClaine *v.* Rankin, 197 U. S. 154.

This statute provides that:

> "*Sec.* 3. . . . All actions of the case except for words spoken and for injuries to the person, all actions of debt founded upon any contract without specialty . . . shall be commenced and sued within six years next after the cause of action shall accrue, and not after.
>
> "*Sec.* 7. If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence."

General Laws of Rhode Island, 1909, Chapter 284.
General Laws of Rhode Island, 1896, Chapter 234.
Public Statutes of Rhode Island, 1882, Chapter 205.
Reynolds *v.* Hennessy, 17 R. I. 69; 20 Atl. 307; 23 Atl. 639.
Peck *v.* Bank of America, 16 R. I. 710; 19 Atl. 369.

Under this Section 7, evidently if there is concealment of the kind stated, a suit is not barred by the Statute of Limitations until six years have elapsed after discovery.

Therefore, in the case at bar, the only discovery of importance for the defense of the Statute of Limitations would be a discovery before August 3, 1910.

It is respectfully submitted that the opinions both in the Court of Appeals and in the District Court ignored this evident consideration.

The Court of Appeals, referring to the date at which these six directors ceased to be such, says:

> "Thereafter at least eleven new directors were chosen who had had no part in the wrongdoings charged against these retiring defendants. Every director remaining or succeeding knew of the wrongs to the bank participated in by these defendants and is charged with additional liability for failure to collect damages therefor from these defendants." (Record, p. 250.)

This is the kernel of the decision of the Court of Appeals.

The same is true of the decision of the District Court. (Record, p. 230.)

This statement of the facts is true only if the Court is speaking of the entire period up to the suspension of the bank, April 12, 1913; for only one new director came on the board in January, 1909, and two in January, 1910 (Record, p. 5), and none thereafter before August 3, 1910. There is nothing in the Bill of Complaint to show that any one of these three out of fifteen directors had discovered or knew before August 3, 1910, of the wrongfulness of any of the transactions of the six retired directors, the appellees.

If these six defendants escape by the Statute of Limitations, three of them escape by one year and seven months only and the other three by seven months only.

In those short periods there is nothing alleged or which can be inferred to suggest a discovery by the bank or by any representative of the bank.

SECOND.

Only Three New Directors were Added to the Board after the Defendants Ceased to be Directors and before August 3, 1910, and the Court in its Opinion Disregards This Fact.

Under the preceding assignment, has been quoted the statement of the Court, that there were at least eleven new directors after these six defendants ceased to be directors. (Record, p. 250.)

The directors and the dates of the beginning and end of their terms are set out in the Bill of Complaint (Record, p. 4). The appellees Connly, Swanson and Smith ceased to be directors January 12, 1909. The defendants Wellman, Fletcher and Dennis ceased to be directors January 11, 1910. The only directors who became such thereafter, before August 3, 1910, were Budlong, chosen January 12, 1909, and Kahn and John R. Dennis, chosen January 11, 1910. Kahn and Budlong are not sued. Kahn ceased to be a director November 4, 1910.

The Court of Appeals and the District Court both must have overlooked entirely the fact that the discoveries after August 3, 1910, were not of consequence.

The statute "did not begin to run until after discovery of fraud."

Exploration Co. *v.* United States, 247 U. S. 435, 447.

THIRD.

The Court in its Opinion Erroneously Assumes that the New Directors Knew Before August 3, 1910, of the Wrongs Committed by the Defendants.

As both the Court of Appeals and the District Court rest their decisions mainly on the counteracting of the concealment by the knowledge acquired by the new directors, both courts must have assumed that the new directors knew before August 3, 1910, of the wrongs committed by the retired directors; for, as has already been pointed out, knowledge acquired after that date would still leave six years unexpired when the suit was brought.

This assumption of knowledge before August 3, 1910, finds no basis in the allegations of the bill or in any inferences to be drawn therefrom. There is nothing on which to base the finding that any of the new directors knew these facts of the former administration before August 3, 1910. On that date the oldest of the new directors had been in office only nineteen months and the other two only seven months. This is a short period in which to infer knowledge of these many transactions occurring during the former administration.

On the other hand, against the possibility of discovery of any suspicious circumstances even, by any independent representative of the bank, the bill makes positive allegations of concealment and of non-discovery until 1913 and thereafter by *any one* except *the directors responsible* therefor. (Par. 40, p. 173; par. 186, p. 219.)

FOURTH.

The Knowledge Acquired by the Several New Directors Did Not, Before August 3, 1910, Amount to Discovery by the Bank.

Persons in a fiduciary position who have concealed from their principal their liability to him or it should not be given the benefit of the defense of the Statute of Limitations until the principal has had six years of knowledge. There is no reason to be quick to infer such knowledge against the positive allegations of a bill of complaint to the contrary.

Even if the three new directors had in the short time before August 3, 1910, discovered all the causes of action concealed by the retired directors, it is submitted that this would not amount to knowledge by the bank. Three-fifteenths of a board of directors is not enough to make their knowledge tantamount to knowledge by the bank. The eyes and ears of a bank may at times be its board of directors as such, but never three individuals out of fifteen merely because those three individuals chance to be severally members of that board.

FIFTH.

The Misrepresentations Made on the Books of the Bank and in the False Reports to the Comptroller, to the Stockholders and to the General Public Relative to Matters during the Time in which the Defendants were Directors, did not Cease to be Misrepresentations when the Defendants Ceased to be Directors, and the Court in its Opinion Speaks Otherwise.

The Court of Appeals says, "These misrepresentations by these defendants ceased when these defendants ceased to be directors." The Court must mean by this that the defendants, after they ceased to be directors, made no new misrepresentations as to the condition and doings of the bank after they ceased to be directors.

The misrepresentations which these defendants had made concerning the affairs of the bank before they ceased to be directors were not retracted in any way. The misrepresentations which they had made concerning the condition in which they had left the bank exist to this day. The books of the bank as kept while these defendants were directors, and the false reports made to the comptroller during that period, and to the stockholders and to the general public, still proclaim that conditions were all right when these defendants ceased to be directors. Those misrepresentations continue, notwithstanding the fact that these defendants have ceased to make new misrepresentations.

SIXTH.

THE COURT FAILED TO GIVE DUE EFFECT TO THE ALLEGATIONS OF FACT IN THE BILL OF COMPLAINT AND PARTICULARLY TO THE ALLEGATIONS OF FACT IN PARAGRAPHS 38 TO 40 AND IN PARAGRAPHS 183 TO 191, SETTING FORTH THAT EACH OF THESE SIX DEFENDANTS HAD FRAUDULENTLY BY ACTUAL MISREPRESENTATIONS CONCEALED THE EXISTENCE OF THE CAUSE OF ACTION IN THIS SUIT, AND THAT IT WAS FIRST DISCOVERED WITHIN SIX YEARS PRIOR TO THE FILING OF THIS BILL OF COMPLAINT.

The Statute of Limitations in question provides that:

> "*Sec.* 7. If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence."

The Bill of Complaint alleges such concealment.

Each defendant for the purpose of concealing from the comptroller, the examiners and the creditors, and persons dealing with the bank, had the books of the bank so kept as to show a false overstatement of these loans and investments and of the capital and surplus to the extent of from $300,000 to $800,000 (par. 38, p. 173).

They had these false books exhibited and false reports and financial statements filed with the comptroller and published, for the same purpose (par. 39, p. 173).

Each of the defendants concealed from the comptroller and from the creditors of the bank, and from the public generally, the fact of these improper loans and investments and the impairment of the capital and surplus, and the liability of the defendants therefor (par. 40, p. 173).

None of these matters were discovered by any one other than the directors before 1913, and many of them were not discovered until the latter part of 1915 (par. 40, p. 173).

The defendants, *with knowledge* of the uncertainty and worthlessness of these items, approved their being carried on the books of the bank at full value (par. 184, p. 218).

In consequence, the impairment of the surplus and capital did not appear on the books of the bank, and *could not be and was not discovered* by the comptroller, the examiners, the creditors, the stockholders, the persons dealing with the bank, or any other persons, except the *directors responsible* therefor (par. 186, p. 219).

The defendants knew that the reports to the comptroller would be made up from these books and contain the same overstatement and misrepresentation of the assets of the bank, and they authorized the officers of the bank to make them in this way and took no action to have the reports show the true condition of the bank in these particulars, and *they knew* that the true condition of the bank and of these loans and investments would be and was thereby *misrepresented and concealed* (par. 187, p. 219).

The forms for these reports contained blanks for the entry of bad and doubtful assets of this character, but notwithstanding this, these were entered in the items of good assets at the full amount (par. 188, p. 220).

Each of these defendants attested in writing the correctness of one or more of these reports (par. 189, p. 220).

When the defendants Connly, Smith and Swanson ceased to be directors, January 12, 1909 (p. 5), this false statement exceeded $150,000, and when the defendants Wellman, Fletcher and Arthur W. Dennis ceased to be directors, January 11, 1910 (p. 5), this false statement exceeded $200,000 (par. 190, p. 221).

If these loans and investments had been truly stated on the accounts and reports, the impairment of the surplus and capital and the liability of the defendants would have become known to the comptroller, the examiners, the stockholders and the creditors of the bank years before the suspension and before the lapse of any statutory period of limitations (par. 191, p. 221).

The defendants' motions to dismiss and the decrees must rest on the assumption that the foregoing allegations are true.

It is submitted that these are allegations of a fraudulent concealment by actual misrepresentation, in consequence of

which the cause of action was not discovered until within six years prior to suit brought.

Under the circumstances, the reports, alone, to the comptroller amounted to such concealment.

These reports are designed to be relied upon by those dealing with the bank, including creditors and stockholders.

Chesbrough *v.* Woodworth, 244 U. S. 72.

The Act of Congress provides that:

> "Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him [the comptroller] specified."

Revised Statutes, Sec. 5211, amended February 27, 1877, Chap. 69, Sec. 1, being Sec. 9774 of Compiled Statutes of 1916.

> "And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Revised Statutes, Sec. 5239, being Compiled Statutes of 1916, Sec. 9831.

Under this section the defendants are liable directly for the loss to the bank, its shareholders, its creditors, or the receiver representing them, which resulted from their permitting the Statute of Limitations to run, through the concealment which they practised in these false reports.

To avoid circuity of action by putting the receiver to separate suits for this concealment, the defendants should be enjoined or prevented from relying on the Statute of Limitations in this suit when their own concealment is the cause of the lapse of time without suit brought.

This branch of the reply to the Statute of Limitations does not rest upon the self-concealing character of the original transactions for which the defendants are sued, but upon the later, *active concealment,* in the false books and in the false reports.

For this purpose the nature of the original acts complained of is of importance only in determining whether their subsequent conduct amounted to concealment. If the defendants had unwittingly, by non-action only, permitted the bank to sustain losses through worthless loans or investments made by other officers, their innocent failure to give account of this on the books of the bank and on the reports to the comptroller would not necessarily amount to positive concealment, but, in the case at bar, the wrong was not mere non-action or neglect on the part of the defendants.

They themselves knowingly made the loans and investments and knew that they were improper and not of the values stated (par. 20, p. 9; par. 26, p. 169; par. 107, p. 169; par. 109, p. 170; par. 109, p. 172). They themselves knowingly declared the dividends (par. 18, p. 8), with knowledge that they were not earned and that the surplus and capital were impaired (par. 19, p. 9).

As the defense of the Statute of Limitations is based on a state statute, evidently the Federal Courts should give it no greater force than that given it by the authoritative interpretation of it by the State Court.

Bauserman *v.* Blunt, 147 U. S. 647.

The Supreme Court of Rhode Island has given a broad meaning to the word conceal. In Peck *v.* Bank of America, 16 R. I. 710; 19 Atl. 369, the Court held that a bank could not defend under the Statute of Limitations against a claim for stock pledged with it by a misappropriating agent where the bank was chargeable with notice of the misappropriation, even if it was in fact guilty of no fraud and was innocent of complicity. The reason given is that in equity in case of fraud the Statute of Limitations begins to run not at the time the fraud is perpetrated, but at the time of its discovery.

The Bill of Complaint states a case of *subsequent positive concealment* and of non-discovery until after August 2, 1910, within six years before suit brought.

SEVENTH.

The Court in Its Opinion has Assumed the Existence of Facts as to the Discovery of the Cause of Action and Opportunity Therefor Contrary to the Allegations of Fact in the Bill of Complaint, and Particularly to the Allegations of the Fortieth and of the One Hundred and Eighty-sixth Paragraphs.

The Bill of Complaint alleges (par. 40, p. 173) that:

> "None of said matters were discovered by any one other than said directors before 1913, and many of them were not discovered until the latter part of the year 1915."

It also alleges (par. 186, p. 219) that:

> "In consequence of this over-valuation of the loans and investments, the impairment of the surplus and capital of the bank did not appear on its books and could not be and was not discovered therefrom by the Comptroller of the Currency, or his examiners, or the creditors of said national banking association, or the stockholders thereof, or the persons dealing therewith, *or any other person* except the directors responsible therefor as aforesaid."

The Court of Appeals apparently adopts, in substance, the opinion of the District Court (Record, p. 250).

The District Court in its opinion *assumes* (p. 237) that there were employees of the bank other than the directors who were available as sources of information.

This assumption is either *contrary to these express allegations* of the bill or else fails in any way to meet them.

The Court also says that "upon withdrawal from the bank the books of the bank remained as full information as to what was carried as assets. It is not contended that the transactions were concealed, but only their true value or the lack of value."

This again fails to meet the allegation that the wrongs complained of were concealed and remained concealed. Unquestionably the fact that certain loans had been made, that certain investments had been made and that certain dividends had been declared, appeared on the books of the bank. This did not counteract the concealment, because the impropriety of the transactions rested upon facts *not appearing on the*

books, namely, the worthlessness of the borrowers and of the concerns in which the investments were made. The information concerning this worthlessness was not upon the books. It does not appear that there was any employee of the bank outside the board of directors who was called upon to investigate into these *outside* facts which showed this worthlessness of items which appeared to be good on examination of the books. Equally, there was nothing on the books which showed the impropriety of the dividends. The books showed that the bank had an unimpaired capital, an unimpaired surplus, additional undistributed profits and earnings out of which to declare the dividends. It was only when the worthlessness of these items of loans and investments was discovered that the absence of earnings and the impairment of the capital and surplus became known. It was then only that the impropriety of the dividends appeared.

In many instances, the excessive character of the excessive loans did not appear on the books. They were excessive, because they were more than ten (10) per cent of the *unimpaired* capital and *unimpaired* surplus of the bank. The impairment of the capital and surplus was kept off the books. At the beginning of 1909 the misstatement exceeded $150,000, and at the beginning of 1910, $250,000 (par. 190, p. 221).

These misstatements were not mere errors of judgment. The directors knew the worthlessness of these items (par. 184, p. 218; par. 25, p. 169; par. 29, p. 170; par. 19, p. 9).

No creditor, no stockholder, no employee outside of the board of directors, no examiner and no comptroller was, in the absence of suspicious circumstances, under a duty to investigate outside the bank to discover the worth of these borrowers. They had a right to rely on the books of the bank. They had a right to rely on the directors until there was something to arouse suspicion.

> Santa Marina Co. *v.* Canadian Bank of Commerce, 242 Fed. 142, 148 (D. C. Cal.).

There is no room for inference. The admitted and positive allegations of the bill are that none of these matters were discovered, before 1913, by *any one*, except the guilty directors (par. 40, p. 173; par. 186, p. 219).

EIGHTH.

The Court Failed to Give Effect to the Law that if a Cause of Action is Once Fraudulently Concealed by the Defendants by Actual Misrepresentations, the Time Fixed by the Statute of Limitations as a Bar Does Not Begin to Run as a Defense to It Until the Existence of the Cause of Action is Discovered by the Party Entitled to Enforce It.

If a cause of action has been concealed, the Statute of Limitations does not begin to run from the time at which it should have been discovered, but only from the time at which it is discovered — in the words of Section 7: "At the time when the person entitled to sue thereon shall first discover its existence."

There is a distinction to be made between a cause of action arising out of fraud without any subsequent, positive concealment and a case like the present, in which there is *subsequent, positive concealment.*

Even in the absence of an express provision in the statute, the Federal Courts hold that the Statute of Limitations does not begin to run in cases arising out of fraud or concealed thereby until the cause of action has been discovered, or should have been discovered, by the exercise of reasonable diligence.

Exploration Co. v. *United States*, 247 U. S. 435.
Prevost v. *Gratz*, 6 Wheat. 481.
Michoud v. *Girod*, 4 How. 503.
Meader v. *Norton*, 11 Wall. 442.
Bailey v. *Glover*, 21 Wall. 342.
Rosenthal v. *Walker*, 111 U. S. 185.
Traer v. *Clews*, 115 U. S. 528.
Kirby v. *Lake Shore & Michigan Southern R. R.*, 120 U. S. 130.
Schroeder v. *Young*, 161 U. S. 334, 344, *semble.*
Eddy v. *Eddy*, (C. C. A. 6th) 168 Fed. 590.
Horton v. *Stegmyer*, (C. C. A. 8th) 175 Fed. 756, 759.

It has been urged for some of the appellees that this rule applies only to cases in equity resting upon liabilities not cognizable at law. This is a misapprehension. It applies at law as well as in equity.

Rosenthal v. Walker, 111 U. S. 185.
Traer *v.* Clews, 115 U. S. 528.

In Bailey *v.* Glover, 21 Wallace, 342, 349, the Court says of the rule:

"We are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the Statutes of Limitation. They were enacted to prevent frauds, to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common law side of the court's calendar as to those on the equity side."

In Kirby *v.* Lake Shore & Michigan Southern R. R., 120 U. S. 130, 138, the Court said:

"It is an inflexible rule in those Courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud."

In these cases the Court has worked out for itself an avoidance of the Statute of Limitations in case of fraud. It has done this by holding that the action is not to be deemed to accrue until its existence has been discovered or should have been discovered.

These decisions, reached without the aid of a statute providing as to the effect of concealment, do not diminish the force of a statute which is explicit. The Rhode Island statute in case of positive concealment does not start the statute running at the time at which the existence of the cause of action should have been discovered, but at the time at which it is in fact discovered.

Under such a statute a defendant who has concealed the cause of action should not be heard to say that a plaintiff who has a good cause of action ought to have discovered it earlier, when the reason for non-discovery is the defendant's own positive concealment.

The distinction between discovery of all the facts necessary to establish a cause of action, and the discovery of suspicious circumstances only, is not involved in the case at bar. There was no discovery before August 3, 1910, by any independent representative of the bank, of any suspicious circumstances, even.

The Court below in its opinion refers to the fact that the representations were not continuing representations (p. 234), and that the earlier reports were superseded by later reports (p. 238). It is respectfully submitted that this should not make a difference. The later reports were as false as the earlier ones. They contained nothing to lead outsiders to a discovery of the falsity of the earlier reports. They helped to maintain the concealment started by the earlier reports, and they did not lessen that concealment.

In this connection it is again noteworthy that the only discovery which would help the defendants in maintaining their defense would be a discovery prior to August 3, 1910. The suit was begun on August 2, 1916. The suit would not be too late to recover for a cause of action discovered within six years prior thereto. This means that three of the defendants escaped, if at all, by a period of one year and seven months and the other three by a period of seven months. In order for the happenings, after they ceased to be directors, to be of any consequence, because a discovery should have taken place, it must appear that that discovery should have taken place within a year and seven months, or within seven months after the two groups respectively ceased to be directors. Only one new director came on the board in January, 1909, and two in January, 1910 (par. 10, p. 5).

Against the possibility of the discovery of any suspicious circumstances even, by any independent representative of the bank, are the positive allegations of concealment and of non-discovery until 1913 and thereafter, by *any one*, except *the directors responsible* therefor (par. 40, p. 173; par. 186, p. 219).

The statute "did not begin to run until after the discovery of the fraud."

Exploration Co. *v.* United States, 247 U. S. 435, 447.

Under the express terms of the Rhode Island statute, when a man once conceals the cause of action, he, through his own fault, loses the benefit of the Statute of Limitations forever, unless and until such time as the existence of the cause of action is discovered.

NINTH.

The Court Failed to Give Effect to the Law that the Time Fixed by the Statute of Limitations as a Bar Does Not Begin to Run as a Defense for Directors of a National Bank Sued for Positive Acts Knowingly Done by Them in Violation of Their Fiduciary Duty to the Bank Until the Cause of Action is Disclosed by Them, or is Discovered.

The preceding three assignments are devoted to the effect of concealment upon the defense of the Statute of Limitations; but it is submitted that apart from concealment, the Statute of Limitations is not a defense, because of the nature of the misconduct of the defendants and of the fiduciary position which they occupied.

When wrongdoers are at arm's length with the person wronged and the wrong is not fraudulent or self-concealing in its character, a mere non-disclosure by the wrongdoer does not necessarily stop the running of the Statute of Limitations.

The contrary is true in the case of a fiduciary, — such as the directors of a national bank.

In such a case the weight of authority is that the statute does not begin to run until the cause of action is discovered, or should have been, by the exercise of ordinary diligence.

Brinckerhoff *v.* Roosevelt, (C. C. A. 2d) 143 Fed. 478; (C. C. N. Y.) 131 Fed. 955; 200 U. S. 622 (Certiorari denied).

Greenfield Savings Bank *v.* Abercrombie, 211 Mass. 252.

Williams *v.* McKay, 40 N. J. Eq. 189.

Bent *v.* Priest, 86 Mo. 475.

Rankin *v.* Cooper, (C. C. Ark.) 149 Fed. 1010.

National Bank of Commerce *v.* Wade, (C. C. Wash.) 84 Fed. 10.

Johnston *v.* Roe, 1 Fed. (C. C. Mo.) 692.

Huntington National Bank *v.* Huntington Distilling Co., (C. C. W. Va.) 152 Fed. 240.

Emerson *v.* Gaither, 103 Md. 564; 64 Atl. 26, 32.

Masonic Co. *v.* Sharpe and Bennett, (1892) 1 Ch. 154.

Ellis *v.* Ward, 137 Ill. 509; 20 N. E. 671.
Williams *v.* Reilly, 41 N. J. Eq. 137, semble.
In re Exchange Banking Co., 21 Ch. D. 519, semble.
In re Oxford Society, 35 Ch. D. 502, semble.
Cockrill *v.* Abeles, (C. C. A. 8th) 86 Fed. 505 (intimations).
Hayden *v.* Thompson, (C. C. A. 8th) 71 Fed. 70 (left open).

The defendants committed two separate wrongs to the bank: the first when they made the worthless loans and investments and improper dividends, and the second when they failed to disclose to the bank, through some independent, disinterested representative, the fact that they were liable to the bank for their misconduct and that their liability should be enforced before it was barred by the Statute of Limitations.

They were just as much under a duty to the bank to preserve for the bank this resource (namely, their own liability) as any other.

They knew that the bank had incurred heavy losses, not yet disclosed, and that the only way in which the bank could recoup itself was by proceeding against the directors who were responsible therefor. It would be just as injurious to the bank to lose the opportunity to enforce that responsibility as it would be to lose the opportunity to hold the defendants as endorsers on promissory notes, through failure to take the necessary steps to realize on their endorsements.

A fiduciary would hardly be heard to say that he was not liable upon his endorsements to his principal because he, the fiduciary, with knowledge of the fact, and in violation of his obligation to his principal, had caused a failure of the demand and notice necessary to fix his liability.

The director of a bank would not be relieved from responsibility if, with full knowledge, he let the bank's good claim against another become worthless through failure to sue before the Statute of Limitations had run in favor of the other.

There is no reason to distinguish where the other is himself.

If he is permitted to escape his original liability by pleading the Statute of Limitations, he should be held liable to the bank for the damage which the bank has sustained in the loss of the right to recover, through his permitting the Statute of Limitations to run in his own favor against the bank without disclosing the facts to the bank, whose fiduciary he was.

To avoid circuity of action he should not be heard to set up the Statute of Limitations in his own favor for any period prior to the time at which he disclosed the cause of action or at which it was discovered or should have been.

In this connection there is a marked distinction between the case of a director who has been neglectful merely and does not know that a loss has been incurred, or that he has become liable, and a case like the present one, in which he knew of the wrongfulness of his acts and therefore of his liability to the bank.

In this case the knowing non-disclosure by the fiduciary is a concealment, because he was under a positive duty to keep the bank informed.

The mere failure to disclose the receipt of funds which should have been paid over to the plaintiff stops the running of the statute.

> Reynolds *v.* Hennessy, 17 R. I. 69; 20 Atl. 307; 23 Atl. 639.

Where the promoters of a corporation have made an undisclosed profit out of the promotion,

> "the time limited by the statute does not begin to run against a breach of trust, where there is a fiduciary duty to disclose the facts on which the cause of action rests, until the facts have or ought to have been discovered."

> Old Dominion Copper Mining & Smelting Company *v.* Bigelow, 203 Mass. 159, 201.

> "To set the statute in motion the relation of the parties must be *hostile*, and so long as their interests are common, or *their relations fiduciary*, as in the case of landlord and tenant, guardian and ward, vendor and vendee, tenant in

common, or trustee and cestui que trust, the statute does not begin to run." (Italics not in original.)

New Orleans *v.* Warner, 175 U. S. 130.

The appellees cited a number of cases to the Courts below, as if to the contrary, but they are distinguishable.

Mason v. *Henry*, 152 N. Y. 529; 46 N. E. 837, was governed by the express terms of the New York statute, which covered both actions at law and suits in equity, in terms. The action was at law.

Wallace v. *Lincoln Savings Bank*, 89 Tenn. 630, was governed by a statute which the Court said was applicable in terms. There was no concealment by the defendants and no ignorance on the part of the plaintiff.

Emerson v. *Gaither*, 103 Md. 564; 64 Atl. 26, 32, involved no concealment. Also the Court held the statute not to be a bar to those causes which had not become known to the stockholders.

Pollitz v. *Wabash Railroad Co.*, 207 N. Y. 213; 100 N. E. 721, did not apply the Statute of Limitations, but merely referred in passing to the fact that it was applicable in equity to a legal cause of action. There was no concealment by the defendant and no ignorance on the part of the plaintiff.

Boyd v. *Mutual Fire Association*, 116 Wisc. 155, involved no concealment by the defendant and no excusable ignorance on the part of the plaintiff.

Bent v. *Priest*, 86 Mo. 475, held that the Statute of Limitations did not apply until the corporation had knowledge.

In *Spering's Appeal*, 71 Penn. St. 11, the defendants themselves did not know of the existence of the liability.

Hayden v. *Thompson*, 71 Fed. 60, was a suit to recover dividends from stockholders and involved no fiduciary obligation of directors and no positive wrongful action.

Cockrill v. *Butler*, 78 Fed. 679, involved no concealment by the defendants and no ignorance on the part of the plaintiff, and the decision was reversed on appeal under the title Cockrill *v.* Cooper, 86 Fed. 7, and in an opinion by the same judge who, at about the same time, in Cockrill *v.* Abeles, 86 Fed. 505,

intimated the possibility that the statute did not apply to directors who were in control of the injured corporation at the time of the injury.

Cooper v. *Hill*, 94 Fed. 582, expressly rested the decision on the ground that the corporation had notice and that there was no concealment.

It is noteworthy that the State Statute of Limitations does not have the force of a statute as a bar in the Federal Courts.

Benedict *v.* City of New York, 250 U. S. 321, 327.

They do not treat it as a bar when, in their opinion, it will work an injustice. However, the refusal to treat the statute as a bar upon such facts as appear in the present case is not confined to Federal Courts. Both the Federal Courts and the State Courts have taken the same position.

In *Brinckerhoff* v. *Roosevelt*, (C. C. A. 2d) 143 Fed. 478; (C. C. N. Y.) 131 Fed. 955; 200 U. S. 622 (Certiorari denied), the suit, although in equity, was for a legal wrong which would support an *action at law* by a corporation for breach of fiduciary duty by its directors. It appears to be the latest decision on the point in the Circuit Court of Appeals. *Certiorari* was denied by the Supreme Court. The Court of Appeals, in holding that the Statute of Limitations was not a defense, said:

> "The action is not barred by the Statute of Limitations or for laches for the reason that the complainant did not discover the wrongful conduct which is the foundation of the action until a few months prior to its commencement. Directors are assumed to act for the interests of their stockholders, and the latter have a right to rely upon the assumption that they are acting honestly until the contrary appears."

Rankin v. *Cooper*, 149 Fed. 1010, is directly in point. The Court said:

> "As to the Statute of Limitations, I have come to the conclusion that it does not apply because the case in my opinion falls under the exceptional circumstances referred to by Sanborn, J., in *Cooper* v. *Hill*, (C. C. A. 8th) 94 Fed. 582, circumstances under which a court of equity

will permit a suit to be maintained notwithstanding the statute, and also because at the time of the commission of the wrongful acts in question and afterwards, until the appointment of a receiver, the defendants who were concerned therein constituted a majority if not the whole of the Board of Directors, and that in consequence of their having full control of the corporation no suit could be brought to redress the alleged grievances until a receiver was appointed."

National Bank of Commerce v. *Wade*, 84 Fed. 10, is directly in point. The Court said:

"The Statute of Limitations of this state provides that the right to commence an action on a contract or liability express or implied which is not in writing and does not arise out of any written instrument is barred after three years from the time the cause of action accrued. But it must be remembered that at the time of making the loans which caused the losses complained of, the defendants were the managing officers of the bank. I hold that in cases of this nature the Statute of Limitations will not begin to run so long as the *cestui que trust* is under the control or influence of the trustee, and as this suit was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the Statute of Limitations."

Greenfield Savings Bank v. *Abercrombie*, 211 Mass. 252, is one of the latest decisions in the State Courts. It is directly in point. The Court considered the earlier decisions. Counsel for some of the appellees have attempted to mitigate the effect of this decision by suggesting that it was dependent upon some peculiarities in the relations between the defendants sued and the bank, for the loss of whose funds they were sued. There is no foundation for such a distinction. Although the bank was a savings bank and the defendants were called a board of trustees, they occupied the position of directors. They were not trustees in the common sense. They did not hold title to the funds of the bank. The funds were the absolute property of the bank. The defendants differed in no pertinent respect from the directors of a national bank. The Court speaks of

the trust relation of the defendants in the same sense in which the directors of a national bank are in a relation of trust and owe a fiduciary duty to the bank. The Court said:

> "This contention [bar of the Statute of Limitations] overlooks the fact which has been sufficiently shown that these defendants stood as to the bank and its depositors in a position of trustees of a direct trust. In such a case the Statute of Limitations does not begin to run against the *cestui que* trust until they have learned of the trustee's wrong-doing or his practical repudiation of the trust and of the duties thereby imposed upon him. Instances of the application of the rule to such cases as the one now before us are sufficiently numerous. *Williams* v. *McKay*, 13 Stewart, N. J., 189, reversing S. C. nom. *Williams* v. *Halliard*, 11 Stewart, 373; *Williams* v. *Reilly*, 7 Stewart, 398; *Ellis* v. *Ward*, 137 Ill. 509; *National Bank of Commerce* v. *Wade*, 84 Federal Reporter, 10; *Brinckerhoff* v. *Roosevelt*, 143 Federal, 478; *In re* Sharpe, 1 Ch. 154 (1892). In most of the cases relied on by the defendants, the case was either governed directly by statute, as In re *Lands Allotment Company*, 1894, 1 Ch. 616, 631, and *Mason* v. *Henry*, 152 N. Y. 529, or it was held that no direct trust relation existed between the parties."

The cases cited in this opinion show that the Court is not resting its decision upon anything peculiar to the board of trustees of a savings bank, to distinguish them from directors of any other kind of bank. The opinion rests upon principles applicable to the directors of all corporations.

It is not necessary to refer in greater detail to the other cases on the same point already cited for the appellant. The great weight of authority is in the appellant's favor. The decision reached in Massachusetts accords with that reached in the Court of Errors and Appeals in New Jersey, in the United States Circuit Court of Appeals for the Second Circuit, in the United States Circuit Court in Arkansas, in the United States Circuit Court in Washington, in the United States Circuit Court in West Virginia, in the Supreme Court of Maryland, in the Supreme Court of Illinois, in the Supreme Court of Missouri and in the courts of Great Britain.

The Statute of Limitations makes no impressive appeal in a case like the one at bar. The parties to be benefited by a recovery in this case have not been neglectful in any way. The receiver represents the stockholders to some extent, but primarily the creditors. They are the ones to suffer if the defendant directors successfully avoid liability under the Statute of Limitations.

Of course the receiver is not responsible for the delay for the statutory period and has not been guilty of any neglect in finding out the existence of the cause of action. The bank itself has not been neglectful. The eyes and ears of the bank were the responsible directors. It is true that creditors or stockholders of the bank, if they had known of the misconduct of the directors, might have found some way of getting redress if the directors would not actuate the bank to bring suit, but neither the stockholders nor the creditors had any occasion to act. Their suspicions were not aroused. They owed no duty of investigation to themselves or to any one else, in the absence of something to arouse their suspicions.

> Santa Marina Co. *v.* Canadian Bank of Commerce, 242 Fed. 142, 148 (D. C. Cal.)

The comptroller and the bank examiners were not required to look outside, into the financial condition of each borrower and of each concern whose securities were held; but even if these officials were negligent, it should make no difference in this case, for they are not agents of the bank or of its stockholders or of its creditors. In no way are the bank or its stockholders or creditors responsible for the negligence of these officials. They are acting not at the instance of the bank, its stockholders or creditors, but at the instance of the Government and as an additional protection to stockholders and to creditors.

If the bank has been guilty of any neglect, it is the neglect of the very directors who are sued. They cannot be heard to say that the bank under their direction has delayed too long to sue them for liabilities known only to them, the directors.

During the decisive one year and seven months from January, 1909, to August, 1910, and during the decisive seven months from January, 1910, to August, 1910, there were only three new directors. Otherwise the whole board — fifteen or more — was composed of those who were equally responsible with the appellees and who had participated with them in doing the acts which gave rise to the liability. No independent representative of the bank discovered or had occasion to discover the worthlessness of the investments or the condition of the borrowers. It was this condition of the borrowers which made both the loans and the dividends wrong.

There was no time at which the bank, its stockholders or its creditors were called upon to investigate into the character of these borrowers and of these concerns in which the defendants had invested the money of the bank. There was nothing to put them upon inquiry as long as the directors were keeping the accounts and making the reports in such a way as to indicate that the bank was in excellent condition, and that these loans and these investments were worth what they appeared to be worth on the books.

To permit the guilty directors to escape at the expense of the creditors of the bank, and merely because there had been a delay of seven months, or even of a year and seven months, would not produce a just result. There is nothing in the Statute of Limitations in its terms or in its purpose which calls for such a result.

The defendants are the ones responsible for the non-discovery of the cause of action, and, therefore, for the failure of the bank to institute the suit.

Therefore, it is submitted that the Court below should have held that, irrespective of concealment, and in view of the non-disclosure and non-discovery, before August 3, 1910, of the wrongs knowingly done by the defendants, the Statute of Limitations was not a bar.

TENTH.

THE COURT SHOULD NOT HAVE DECREED THAT THE STATUTE OF LIMITATIONS CONSTITUTED A DEFENSE FOR THESE SIX DEFENDANTS OR ANY OF THEM, AND SHOULD NOT HAVE DISMISSED THE BILL OF COMPLAINT AS TO THEM.

This suit was begun August 2, 1916. The six-year period provided by the Rhode Island Statute of Limitations had not run as to anything subsequent to August 2, 1910.

Discovery of the cause of action, or an opportunity to discover the cause of action, can at best for the defendants be of importance only if it occurred prior to August 3, 1910.

Three of the appellees remained on the board of directors until January, 1909, and three until January, 1910.

The shortness of the period of time involved, namely, one year and seven months in the case of three defendants, and seven months only in the case of the other three defendants, is not considered in the opinions of the Court of Appeals and of the District Court. On the contrary, the Court says (p. 236): "Many new directors came on the board who were not participants with them in the loans and other transactions with which these defendants are charged." Evidently this has reference to the entire period up to April 12, 1913; for only three new directors had come on the board between January 11, 1909, and August 2, 1910 (par. 10, p. 4).

However, this is only a part of the reasons why the Statute of Limitations should fail as a defense.

As already set forth under the sixth and eighth assignments, the defendants concealed the cause of action, and it was not in fact discovered, and there was no opportunity to discover it by the exercise of any required diligence on the part of any independent representative of the bank, until within six years prior to suit brought, and where there has once been a concealment, by its own express terms, the statute does not begin to run until there is a discovery.

Also, as set forth under the ninth assignment, apart from concealment the defendants are not entitled to the defense of the Statute of Limitations. They were directors of a bank and therefore under a fiduciary duty to the bank to preserve its assets by the utmost exercise of reasonable diligence on their part. They knew that the loans and investments which they made were bad and that the dividends which they declared were unauthorized. They made the loans and investments themselves. They declared the dividends themselves. They did not disclose to any independent representative of the bank that the loans were bad, that the investments were bad, or that the dividends were unauthorized, or that the defendants were liable to the bank. These facts were not discovered before August 3, 1910, or, indeed, before the appointment of the receiver in 1913.

On the case stated, the Statute of Limitations is not a bar.

ELEVENTH.

If the Decrees of the District Court Appealed From were Not Final within the Terms of the Statutes Governing Appeals, then the Dismissal of the Appeal should be without Prejudice.

If the appeal from the District Court to the Circuit Court of Appeals did not lie until after the other fifteen cases included in this Bill of Complaint against the other fifteen directors had been decided, it is evident that the Court of Appeals should not have entertained the appeal and affirmed the decree of the District Court. On the contrary, it should have dismissed the appeal as premature.

However, it is submitted that the Court of Appeals was right in entertaining jurisdiction. (Record, p. 249.)

It is evident that these decisions in favor of the six appellees are appealable under Judicial Code, Section 128, Compiled Statutes of 1916, Section 1120, eventually—if not at this time, then at the end of the suits against the other respondents.

Mendenhall *v.* Hall, 134 U. S. 559, 568.
La Bourgogue, 210 U. S. 95.
Ex parte Nebraska, 209 U. S. 436.
In re Pollitz, 206 U. S. 323.

Therefore the question raised is one of time only.

It requires no argument to show the disadvantage to the Court, and to the parties, of postponing a decision on this appeal. Until there is a final decision, the appellees remain virtually parties to the cases against the other respondents. If the decrees of dismissal are not final, either the evidence introduced in the Court below against the other respondents will be evidence against the appellees also, or else it will be necessary to introduce that evidence a second time against the appellees, after the cases are ended against the other respondents, and the appeal has been heard by this Court and the decrees of dismissal reversed. On the other hand, if the decrees are never to be reversed, it is of importance to the appellant and to the

appellees to know this fact before closing the evidence in the cases against the other respondents.

In addition to these considerations of policy, it is submitted that the appellant has a right to the decision of this Court at this time.

It can be assumed in this case that a decree dismissing a suit as to one of two, liable jointly only, while the suit is retained as to the other, is not a final decree.

Bank of Rondout *v.* Smith, 156 U. S. 330.
Menge *v.* Warriner, 120 Fed. 816 (C. C. A. 5th).
Hohorst *v.* Packet Company, 148 U. S. 262.

> "If each of the various defendants here had no relations to each other, except that they were stockholders in the same national banking association, it may be the rule would not apply."

Baker *v.* Old National Bank of Providence, R. I., 91 Fed. 449 (C. C. A. 1st).

It is as well settled that, if a decree dismisses the suit as to one, with whom there is a severable controversy, it is final for purposes of appeal.

Hill *v.* Chicago & Evanston Railroad Company, 140 U. S. 52.
Jackson *v.* Jackson, 175 Fed. 710, 714 (C. C. A. 4th).
Standley *v.* Roberts, 59 Fed. 836, 839 (C. C. A. 8th).
Ex Parte *v.* National Enameling Company, 201 U. S. 156, 165 (dictum).
Forgay *v.* Conrad, 6 How. 201.
Bunnell *v.* Berlin Bridge Company, 66 Conn. 224; 33 Atl. 533, 536.

> "A final decision which completely determines the rights, in the suit in which it is rendered, of some of the parties who are not claimed to be jointly liable with those against whom the suit is retained, . . . is subject to review in this court by appeal or writ of error."

Standley *v.* Roberts, 59 Fed. 839 (C. C. A. 8th).

"Where a decree is made as to one of several defendants whose interests are not at all connected with that of the other defendants, such decree is final as to him, although the cause may be still pending in the court as to the rest."

Bray *v.* Staples, 180 Fed. 330.

"The Supreme Court has at times looked at the substance rather than the letter of the rule," . . . "So an appeal has been sustained where there have been several defendants and a separate controversy has been found to exist as to some of them."

Sheppy *v.* Stevens, 200 Fed. 946 (C. C. A. 2d).

In the case at bar, there is both in substance and in form a separate and severable controversy with the appellees severally liable.

The suit is against twenty directors and the three administrators of a deceased director. All of these except the six appellees were directors within six years prior to suit brought. On this ground the Court has retained the bill as to the fifteen while dismissing it as to the six, who ceased to be directors more than six years before suit brought (p. 239).

Each respondent is under a several liability, and the controversy as to the six appellees is wholly separable from that as to each other respondent.

It is for the convenience of the Court and of the parties that these twenty-one suits are combined in one. Each respondent might have been sued separately.

The receiver of a national bank, in suing directors on claims such as are set forth in this suit, may join in one action all who are in like situations, but he is not obliged to do so.

Corsicana National Bank *v.* Johnson, 251 U. S. 68, 82, Dec. 8, 1919.

Williams *v.* Brady, 221 Fed. 118; 232 Fed. 740.

Chesbrough *v.* Woodworth, 195 Fed. 875 (C. C. A. 6th), semble.

Gaither *v.* Bauernschmidt, 108 Md. 1.

In Yates *v.* Jones, 206 U. S. 158; 240 U. S. 351, apparently all were not joined.

It has been held repeatedly that there is no right of contribution among those liable *ex delicto* in the same degree.

Union Stock Yards Co. *v.* C. B. & Q. R. R., 196 U. S. 217.
Bartle *v.* Nutt, 4 Peters, 184.
Dent *v.* Ferguson, 132 U. S. 50, semble.

This is true even when there was an absence of knowledge that the act was wrong.

Ervin *v.* Oregon Ry. & Nav. Co., 20 Fed. 577, 582.
Gilbert *v.* Finch, 173 N. Y. 455.
Power *v.* O'Connor, 19 W. R. 923.
Attorney General *v.* Wilson, 1 Craig & Phillips, 1, 28, dictum.
Heath *v.* Erie Railway Co., 8 Blatch. 347, 411, dictum.

In the case at bar, each of the respondents is under a several liability.

Cooper *v.* Hill, 94 Fed. 582, 588 (C. C. A. 8th).
Charitable Corporation *v.* Sutton, 2 Atk. 400.

Also the several respondents were directors during different periods (par. 10, p. 4). They are liable for different transactions and for different amounts. The six appellees are liable for a smaller amount than the other fifteen respondents (par. 194, p. 223; par. 51, p. 184; par. 67, p. 197; par. 68, p. 198; par. 69, p. 198; par. 70, p. 199; par. 72–95, pp. 200–207). Nine of the directors did not go on the board until the six appellees had ceased to be directors (par. 10, p. 4). They took no part in making the loans, investments and dividends for which it is sought to hold the appellees liable. On the other hand, sixty or seventy per cent of the loans, investments and dividends for which other respondents are to be charged were made after the appellees ceased to be directors, and it is not claimed that the appellees are liable therefor (par. 192, p. 222).

It is not alleged that the acts of the appellees were done in conspiracy with the other respondents (p. 236; par. 18, p. 8; par. 20, p. 9; par. 27, p. 169).

It would be difficult to find a clearer instance of the inclusion under one title, for the sake of convenience, of twenty-one suits for differing causes of action against twenty-one respondents separately liable, of whom six have a controversy separable from all the others, namely, a controversy as to the applicability of the Statute of Limitations to the appellees, because they ceased to be directors more than six years before suit brought.

In the Court below these appellees have won finally on this separable controversy. The decrees of dismissal settled that controversy, and these appellees, liable severally, are finally dismissed.

Such decrees are final decisions, from which an appeal lies at once.

Respectfully submitted,

EDWARD F. McCLENNEN,
GEORGE H. HUDDY, Jr.,
For the Appellant.

Dunbar, Nutter & McClennen,
Huddy, Emerson & Moulton,
Attorneys for the Appellant.

TABLE OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 69.

RENSSELAER L. CURTIS, Receiver,
Complainant, Appellant,

v.

JOHN J. CONNLY ET AL.,
Respondents, Appellees.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF IN BEHALF OF RESPONDENTS EDWIN A. SMITH (NOW DECEASED) AND DONALD E. JACKSON, EXECUTOR UNDER THE WILL OF SAID EDWIN A. SMITH.

ARTHUR M. ALLEN,
GREEN, HINCKLEY & ALLEN,
TURKS HEAD BLDG., PROVIDENCE, R. I.,
Attorneys for Respondents, Appellees.

L. H. LANE, Law Printer, 221 High Street, Boston.

SUBJECT INDEX.

TABLE OF CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 69.

RENSSELAER L. CURTIS, RECEIVER,
COMPLAINANT, APPELLANT,
v.
JOHN J. CONNLY ET AL.,
RESPONDENTS, APPELLEES.

BRIEF IN BEHALF OF RESPONDENTS EDWIN A. SMITH (NOW DECEASED) AND DONALD E. JACKSON, EXECUTOR UNDER THE WILL OF SAID EDWIN A. SMITH.

STATEMENT OF CASE.

This case is before the Court for hearing on the appeal of Rensselaer L. Curtis, Receiver, Complainant in the court below, from the decree entered therein by the Circuit Court of Appeals for the First Circuit March 4, 1920, affirming the decree of the District Court of the United States for the District of Rhode Island, which dismisses the bill of complaint as to six of the respondents.

The suit is a bill in equity brought by said Curtis as Receiver of the Atlantic National Bank against twenty-one of its former directors and three administrators of a deceased director to recover for losses alleged to have been suffered by the Bank by reason of the alleged negligence of the directors in conducting its affairs.

Various motions to dismiss and strike out were filed on numerous grounds, including the defense of the Statute of Limitations. Hearings were had on these motions in the District Court, as a result of which the complainant was ordered to file a further and better statement of the nature of his claim, and further and better particulars of the matter of his bill in accordance with the opinion of the District Court. The complainant accordingly filed an amendment to the bill of complaint.

The motions to dismiss and strike out were renewed and, after hearing, the District Court dismissed the bill of complaint as against the respondents, Arthur W. Dennis, Henry Fletcher, D. Henry Wellman, John J. Connly, Edwin A. Smith, Donald E. Jackson, Executor under the will of Edwin A. Smith, and Oscar Swanson, on the ground that the action as against them was barred by the Statute of Limitations. The motions of the other respondents to dismiss and to strike out were denied but without prejudice, by reason of such denial, to the right of the respondents to reargue upon final hearing any point of law or fact going to the merits.

This brief is filed in behalf of the respondents Edwin A. Smith and Donald E. Jackson, Executor under his will.

The respondent Smith died pending the suit and a subpoena was served upon the respondent Jackson, to make him a party, and said Smith's death was suggested on the record.

The question to be covered by this present brief is whether the suit is barred by the Statute of Limitations.

The bill of complaint was filed August 2, 1916.

The respondent Smith acted as a director from June 15, 1906, to January 12, 1909. (Record, p. 5.) He therefore ceased to be a director over seven years and six months before suit was brought.

No wrongful acts are charged against this respondent

after he ceased to be a director. (Record, pp. 221, 222, par. 192.)

In order to understand the nature of the charges a brief statement of the complainant's claim will be useful.

As already stated, the bill was brought against twenty-one directors and the administrators of another director, six of the directors (the appellees) having ceased to serve more than six years and six months before suit (the respondent Smith more than seven years and six months), and the others serving for various periods between January, 1906, and April 12, 1913. The Board was constantly changing, many new directors coming upon the Board after the retirement of Mr. Smith and the other appellees.

The basis of the claim against the respondents is evidently negligence. It is alleged that the losses in question were suffered by reason of the fact that the defendants "failed and neglected to give to the affairs, business, assets and liabilities of said national banking association, the time, diligence, attention, fidelity, prudence, intelligent interest, and consideration, which ordinarily careful men give and should give to such matters". (Record, p. 7, Bill of Complaint, par. 15.) This paragraph was stricken from the bill by the amendment on the ground, as the complainant himself said, that the matters contained therein were set out in detail elsewhere. (Record, p. 184, par. 50.)

The manner in which the six respondents caused the alleged losses is stated to be in general the payment of dividends when the corporation had no net profits out of which to pay them and the making of bad or unauthorized investments and bad and excessive loans. The establishing of the charges, however, in each case depends upon the question as to the value at any particular time of the loans and investments. In other words, whether at any particular time there were profits out of which to pay

dividends, and whether loans were excessive, depends upon the value at such time of the assets of the bank. The directors who became such later, or who continued to hold office during the later period, are also charged with failing to collect loans which by the exercise of due diligence might have been collected.

An examination of the bill of complaint will show that no one of the charges against the respondents involves the making of any gain or profit for the respondents themselves. Furthermore the discussion in our brief will, we think, establish that all of the alleged wrongful acts (certainly of those committed by the directors who retired early from the Board) became such by reason, not of intentional wrongdoing, but of a misjudgment as to facts concerning the value of securities and the worth of corporations or individuals and as to the character of an officer of the bank, about which reasonable men might differ. We say this in spite of the broad allegations of knowledge upon the part of the directors made in the bill which, however, we believe will not stand the test when compared with the *allegations of specific facts*. Particularly is this true with regard to the appellees, all of whom ceased to be such more than six years before the bill of complaint was filed, and in the case of Mr. Smith more than seven years and six months.

Prima facie it is clear that the Statute of Limitations necessarily applies. The directors not only ceased to be such beyond the period of the Statute of Limitations, but it is admitted that none of their acts were committed within the statutory period.

The complainant sought to avoid the effect of the statute by claiming that the directors fraudulently concealed the cause of action against them, and that they were guilty of positive acts knowingly done in violation of their fiduciary duty and that the Statute of Limitations

would not therefore run until the cause of action against them was disclosed by them or discovered. The gist of both claims is the concealment of the cause of action. The concealment relied upon consisted in carrying the loans and investments alleged to have been improperly made at their face value, instead of at their alleged real value, upon the books, statements and reports of the bank.

The Circuit Court of Appeals, affirming the decision of the District Court for the District of Rhode Island (259 Fed. 961), held that inasmuch as when these six defendants ceased to be directors the bank was still solvent, any contention that the receiver had any greater rights than the stockholders was thereby negatived; that when new directors came upon the board, no collusion being alleged, the bank had at least constructive notice of the cause of action and failed for more than six years to bring suit; that the facts were in any event discoverable; that the wrong-doing of the defendants ended when they retired and could not be projected into the future for an indefinite period except through some subsequent act of each defendant.

Reference is made to the Court's opinion in full (Record, p. 249), but for convenience we quote the following sentences from the opinion: —

> "The gist of the case may be stated in a few sentences: When these six defendants ceased to be directors, the bank was still solvent. The rights of no creditor had then been impaired. This fact negatives any possible contention, concerning the validity of which no opinion is intimated, that the receiver has, as against these defendants, any other or greater rights than accrued to the corporation and through it to its stockholders. Thereafter at least eleven new directors were chosen who had had no part in the

wrongdoings charged against these retiring defendants. Every director remaining or succeeding knew of the wrongs to the bank participated in by these defendants and is charged with additional liability for failure to collect damages therefor from these defendants. No collusion between these six defendants and the old directors or the new directors is alleged. The bank therefore knew of the cause of action against them and failed for more than six years to bring suit. 1 Morse on Banks, 4th Ed., sec. 134; 10 Cyc., p. 1057. *Nat. Sec. Bank* v. *Cushman*, 121 Mass. 490. Under these circumstances, we think the action barred, whether the question be tested under the strict provisions of the General Laws of Rhode Island, chap. 284, sec. 7 (*McClaine* v. *Rankin*, 197 U. S. 154), or under the broader and more flexible rule laid down in *Kirby* v. *Lake Shore R. R.*, 120 U. S. 130, 136–138; *Exploration Co.* v. *U. S.*, 247 U. S. 435; and *Bailey* v. *Glover*, 21 Wall. 342.

"The basic misrepresentations complained of consisted in carrying assets known to be bad on the books as good at face value, with resultant false reports to the comptroller, to the stockholders and to the general public. But these misrepresentations by these defendants ceased when these defendants ceased to be directors. They made thereafter no attempt to conceal the truth from their successors or from anyone else. They did not in fact conceal the true condition from either the old or the new directors, all of whom knew all the facts. The facts were also easily discoverable by competent and careful bank examiners.

"Nor can the contention made, not with much apparent confidence, — that the statute did not begin to run in favor of the retiring directors until the bank

passed into the control of a board, the majority of whom had not participated in the wrongs alleged against the retiring members, — be sustained. Under such a rule, the statute would not in the case at bar be applicable to these six defendants. But, as already noted, the retiring directors are not charged with collusion or conspiracy after their retirement, either with their former associates or with the new directors. Without such collusion or conspiracy, the wrong-doing of each of these six defendants ended when he retired; it cannot be projected forward for an indefinite period except through some subsequent act of each defendant. It was within the power of the bank to have removed the entire board when it knew, as it did, through the new directors, of the wrongs participated in by the old board. The six who retired cannot be held responsible for the control of the corporation when they had nothing whatever to do with that control. Such a rule, if adopted, would be as applicable after seventeen years' (or any other number of years) retirement as after seven years' retirement. All the evils of stale claims, asserted after material facts have been forgotten, important witnesses have died or become otherwise unavailable, exonerating papers have been destroyed or lost,— would be let loose. Compare *Woods* v. *Carpenter*, 101 U. S. 135, 139, where Mr. Justice Swayne said: —

"'Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is

constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.'"

A decree was entered in accordance with this opinion dismissing the bill as against the six respondents, and the complainant appealed, assigning as error (Rec. p. 253) the following: —

"First. No discovery or disclosure of the existence of the cause of action to the Atlantic National Bank of Providence, R. I., would have any effect upon the Bar of the Statute of Limitations unless that discovery occurred before August 3rd, 1910, six years before this suit was begun — August 2nd, 1916, and therefore the knowledge acquired by Directors after August 3rd, 1910, and the number of Directors who first became such after August 3rd, 1910, was immaterial to the question before the Court, but the Court in its opinion disregards this.

"Second. Only three new Directors were added to the Board after the defendants ceased to be Directors and before August 3rd, 1910, and the Court in its opinion disregards this fact.

"Third. The Court in its opinion erroneously assumes that the new Directors knew before August 3rd, 1910, of the wrongs committed by the defendants.

"Fourth. The knowledge acquired by the several new Directors did not, before August 3rd, 1910, amount to discovery by the Bank.

"Fifth. The misrepresentations made on the books of the Bank and in the false reports to the Comptroller, to the Stockholders, and to the General Public

relative to matters during the time in which the defendants were Directors, did not cease to be misrepresentations when the defendants ceased to be Directors and the Court in its opinion speaks otherwise.

"Sixth. The Court failed to give due effect to the allegations of fact in the Bill of Complaint, and particularly to the allegations of fact in the 38th to the 40th and in the 183d to the 191st paragraphs setting forth that each of these six Defendants had fraudulently by actual misrepresentations concealed the existence of the cause of action in this suit and that it was first discovered within six years prior to the filing of this Bill of Complaint.

"Seventh. The Court in its opinion has assumed the existence of facts as to the discovery of the cause of action and opportunity, therefor, contrary to the allegations of fact in the Bill of Complaint, and particularly to the allegations of the 40th and of the 186th paragraphs.

"Eighth. The Court failed to give effect to the law that if a cause of action is once fraudulently concealed by the Defendants by actual misrepresentations, the time fixed by the Statute of Limitations as a bar does not begin to run as a defense to it until the existence of the cause of action is discovered by the party entitled to enforce it.

"Ninth. The Court failed to give effect to the law that the time fixed by the Statute of Limitations as a bar does not begin to run as a defense for the Directors of a National Bank sued for positive acts knowingly done by them in violation of their fiduciary duties to the Bank until the cause of action is disclosed by them or is discovered.

"Tenth. The Court should not have decreed that

the Statute of Limitations constituted a defence for these six Defendants or any of them, and should not have affirmed the decrees dismissing the Bill of Complaint as to them.

"Eleventh. If the decrees of the District Court appealed from were not final within the terms of the Statutes governing appeals, then the dismissal of the appeal should be without prejudice."

The appellant summarizes his position in his brief (p. 2) as follows: —

"The appellant contends that the Statute of Limitations is not a bar: first, because of the concealment; and second because, irrespective of concealment, the directors, as knowing and positive wrongdoers in a fiduciary position, cannot set up the Statute of Limitations prior to disclosure by them of the cause of action or discovery thereof by the parties wronged."

The respondents on the other hand submit that no concealment within the meaning of the statute and the authorities actually existed, a point not expressly passed upon by the court below, and that even if there were such concealment, it is incumbent upon the complainant to show affirmatively not only that *he did not discover the cause of action* before the statute commenced to run against him but also that he *could not by the exercise of reasonable diligence have discovered it* within the period in question. The respondents also deny that directors are trustees as of an express trust and therefore claim that they are entitled to the full benefit of the Statute of Limitations. They also deny that the court committed any error as alleged in the assignment of errors. Before specifically discussing the assignment of errors it will be useful to review briefly the law applicable thereto.

I. BRIEF ON THE LAW.

(1) The Statute of Limitations is a Meritorious Defense.

Counsel feel that they are justified in insisting that the defense of the Statute of Limitations is a meritorious one and that courts should give it full effect where it is applicable and not seek for means to defeat it. If the statutory period has elapsed before suit is brought, the burden is upon the plaintiff to bring the case within some recognized exception to prevent it from being barred.

Bell v. *Morrison*, 1 Pet. 351.
Wood v. *Carpenter*, 101 U. S. 135.
Campbell v. *Haverhill*, 155 U. S. 610.

In the first of these cases the Supreme Court by Mr. Justice Story said at page 360: —

> "It has often been matter of regret in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support as would have made it what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them."

This is quoted with approval in the opinion in the last of the above cases.

In *Wood* v. *Carpenter, supra,* the court says at page 139:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar."

(2) The Rhode Island Six Year Statute of Limitations is Applicable to this Suit.

The Rhode Island Statute of Limitations (which is the only statute applicable, *McClaine* v. *Rankin,* 197 U. S. 154) is contained in General Laws of Rhode Island, Chapter 284, Section 3, which is as follows: —

> "Sec. 3. All actions of account, except on such accounts as concern trade or merchandise between merchant and merchant, their factors and servants, *all actions of the case* except for words spoken and for injuries to the person, all actions of debt founded upon any contract without specialty or brought for arrearages of rents, and all actions of detinue and replevin, shall be commenced and sued within six years next after the cause of action shall accrue, and not after."

As already pointed out, the respondent, Edwin A. Smith, ceased to be a director January 12, 1909, and the present bill was not brought until August 2, 1916,—over seven years and six months after any liability upon the part of

this respondent could have arisen. Under these circumstances it is clear that the Statute of Limitations has run in his favor, unless there is some reason why he is taken out of it.

(a) A suit like the present one brought by a receiver against the directors of a corporation is based on legal demands and is not in the exclusive jurisdiction of courts of equity.

The Federal authorities upon this point are conclusive.

Briggs v. *Spaulding*, 141 U. S. 132, 147, semble.
Cooper v. *Hill*, 94 Fed. 582.
Stephens v. *Overstolz*, 43 Fed. 771.
Corsicana Bank v. *Johnson*, 218 Fed. 822, 251 U. S. 68.

In *Cooper* v. *Hill, supra*, the court at page 589 said: —

"The appropriate action at law to enforce the implied liability upon which it rests is an action on the case, and this section provides that the time for the commencement of such an action is limited to six years from the time when its cause accrued. The conclusion is inevitable that an action at law for the cause upon which this decree is based would have been governed by section 2900, and could not have been maintained six years after its cause accrued. The natural result of this conclusion is that this suit ought to be governed by the same rule, both on the ground that courts of equity usually apply the doctrine of laches in analogy to the statute of limitations relative to actions at law of like character, and on the ground that section 2909, *supra*, expressly requires it to be so applied."

(b) It is established that the Statute of Limitations, even though in terms it applies to legal actions, is binding directly on the courts in equity, especially when the suit is based on legal demands.

Not only is this an action against directors and therefore comes within the cases cited under subdivision (a) *supra*, but as has already been pointed out the liability of the respondents is based upon negligence, which would form the basis for an action at law. The principal ground of equity jurisdiction, if any exists, is to avoid multiplicity of actions. Practically the unanimous weight of authority is to the effect that the Statute of Limitations is therefore applicable. See the following cases: —

Bank v. *Daniel*, 12 Peters 32, 56.
Carrol v. *Green*, 92 U. S. 509.
Godden v. *Kimmell*, 99 U. S. 201.
Bank v. *Dispatch Co.*, 149 U. S. 436.
Baker v. *Cummings*, 169 U. S. 189.
McDonald v. *Thompson*, 184 U. S. 71.
Sherwood v. *Sutton*, 5 Mason 143 (C. C. N. H.).
Hayden v. *Thompson*, 71 Fed. 60.
Cooper v. *Hill*, 94 Fed. 582.
Hale v. *Coffin*, 114 Fed. 567 (Maine).
Hale v. *Coffin*, affirmed, 120 Fed. 470 (C. C. A. 1st C.).
Kelley v. *Dolan*, 233 Fed. 635 (C. C. A. 3d C., 1916).
Sessions v. *Richmond*, 1 R. I. 298, 302.
Atwood v. *Bank*, 2 R. I. 191, 196.
Manchester v. *Mathewson*, 3 R. I. 237, 252.
Baker v. *Bank*, 9 Metc. 182, 195.
Comm. v. *Bank*, 3 Allen 42, 47.
Spering's Appeal, 71 Pa. St. 11.

(3) Concealment of the Existence of the Cause of Action in Order to Avoid the Statute of Limitations Must be Accomplished Fraudulently by Actual Misrepresentation.

An examination of Section 3 of Chapter 284 of the General Laws above quoted will show that there is no exception in the Statute of Limitations itself. The cause of action must be sued upon within six years after it accrues and not after. Nothing is said here about lack of knowledge of the cause of action. Mere lack of knowledge of the existence of the cause of action, except as provided for in Section 7 of this chapter, *does not prevent the statute from beginning to run.* Section 7 of said chapter however provides as follows: —

> "SEC. 7. If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence."

The meaning of this statute is unmistakable. The defendant must "conceal" the cause of action, first, "fraudulently", that is, with an intent that the other shall rely upon it; and second, "by actual misrepresentation", that is, by some false word or act, something positive, active, unmistakable. Even in the absence of such a statute the authorities hold that more than mere silence or inaction is necessary. See the cases cited under the next point of this brief.

(4) The Fraudulent Concealment Must be in the Nature of a Trick or Artifice Purposely Designed to Conceal the Cause of Action.

The authorities are practically unanimous to the effect that there must be some positive misrepresentation of a fraudulent nature amounting to a trick or artifice. See the following cases: —

Wood v. *Carpenter* (1879), 101 U. S. 135.
Jackson v. *Jackson* (1898), 149 Ind. 238.
Strout v. *United Shoe Machinery Co.* (1913), 208 Fed. 646 (D. C. Mass.).
Hall v. *Pennsylvania Railroad Co.* (1917), 257 Pa. St. 54, 63.
Keithley v. *Mutual Life Ins. Co.* (1916), 271 Ill. 584.
Dalzell v. *Lewis* (1916), 252 Pa. St. 283.
Terry v. *Davenport* (Ind. 1916), 112 N. E. 998.
Fidelity & Casualty Co. of New York v. *Jasper Furniture Co.* (Ind. 1917), 117 N. E. 258.
Oklahoma Farm Mortgage Co. v. *Jordan* (Okla. 1917), 168 Pac. 1029.

The rule is as stated in *Jackson* v. *Jackson*, *supra*, at page 243:

> "There must have been some trick or artifice to prevent a discovery, or some material fact mis-stated to or concealed from the party by the means of some positive or affirmative act or declaration when inquiry was being made or information sought. . . ."

In *Wood* v. *Carpenter*, *supra*, Swayne, J., at page 143, said: —

> "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

It will be shown later that the complainant has not brought this case within the rule laid down in the above authorities. It will also be shown that the alleged representations were representations as to value and the authorities hold that statements relative to such matters can ordinarily be considered in law as nothing more than expressions of opinion and cannot constitute fraudulent misrepresentation.

(5) The Allegation of Concealment Must Show not only that the Cause of Action was not Discovered but that Due Diligence was used in Discovering It.

The complainant in his assignment of errors seems to rely upon the proposition that the Statute of Limitations begins to run when the existence of the cause of action was actually discovered. This is not the rule. The Statute will begin to run when the complainant should have discovered the alleged wrongful acts by the exercise of reasonable diligence. The authorities appear to be uniform upon this point.

Wood v. *Carpenter*, 101 U. S. 135.
Stearns v. *Page*, 7 How. 819, 829.
Strout v. *United Shoe Machinery Co.*, 208 Fed. 646.
Price v. *Mutual Reserve Life Ins. Co.*, 102 Md. 683.
Burke v. *Maguire*, (Cal.) 98 Pac. 21.
Wm. Tinkham Co. v. *Royal Worsted Mills* (R. I.), Rescript of Tanner, P. J., Sup. Ct. No. 28,968.
School District v. *Deweese*, 93 Fed. 602.
Old Dominion Copper Co. v. *Bigelow*, 203 Mass. 159, 201.
Kirby v. *Lake Shore Railroad*, 120 U. S. 130.
Williamson v. *Beardsley*, 137 Fed. 467, 470 (C. C. A. Eighth Circuit).
Jackson v. *Jackson*, 149 Ind. 238.

Beaubien v. *Beaubien*, 23 How. 190.
Hoy v. *Burk* (1916), 92 Wash. 536.
Gibson v. *Jensen* (Utah 1916), 158 Pac. 426.

This is the law in Rhode Island, and also in the Federal courts.

In *Wm. Tinkham Co.* v. *Royal Worsted Mills*, Rhode Island Superior Court No. 28,968 (an unreported case), Presiding Justice Tanner said : —

> "The plaintiff's demurrer to the fourth replication to the second plea is sustained. . . . We think it should appear, however, distinctly that the plaintiff did not itself weigh the yarn, but relied wholly upon the reports of the weights by the defendant. We think it should also appear that the defendant reported the weights with knowledge of their falsity. We think also the plaintiff should allege the time and manner of discovering the alleged cause of action and the alleged concealment thereof, and should also show that the plaintiff by exercise of reasonable diligence might not have discovered the alleged cause of action and concealment more than six years prior to the commencement of plaintiff's suit."

In *Stearns* v. *Page*, *supra*, at page 829, Grier, J. said:—

> "And especially must there be distinct averments as to the time when fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."

In *Beaubien* v. *Beaubien*, *supra*, at page 208, Nelson, J., said:

> "The particular acts of fraud or concealment should have been set forth by distinct averments, as

well as the time when discovered, so that the court may see whether by the exercise of ordinary diligence, the discovery might not have been before made."

In *Wood* v. *Carpenter, supra,* at page 143, the following language is used : —

> "There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. . . . and the delay which has occurred must be shown to be consistent with the requisite diligence."

In *Williamson* v. *Beardsley, supra,* at page 470, the Circuit Court of Appeals for the Eighth Circuit, speaking by Hook, Cir. J., said:

> "Discovery as employed in a statute or equitable rule of limitations, and knowledge are not convertible terms, nor does the former mean the result of a resort at leisure to known sources of information. The possession of the means of knowledge is equivalent to knowledge itself. A party who has the opportunity of knowing the facts of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches."

In *Strout* v. *United Shoe Mach. Co., supra,* at page 652, in the District Court for Massachusetts, Dodge, Cir. J., in speaking of a reply to the defense of limitations, said:—

> ". . . his allegations must show that he exercised reasonable diligence, yet was unable to discover it earlier."

In *Old Dominion Copper Co.* v. *Bigelow, supra,* at page 201, it was said that the time limited by the statute does not begin to run "until the facts have or *ought to have* been discovered". (Italics ours.)

In *Kirby* v. *Lake Shore R. R., supra,* the Court at page 136 said: "time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, *it might have been discovered*". (Italics ours.)

In *Price* v. *Mutual Reserve Life Ins. Co., supra,* in sustaining defendant's demurrer to plaintiff's replication of fraudulent concealment, the court (Page, J.) at page 688 said:

> "This replication was insufficient, in that it is not alleged that the fraud was not discovered and could not have been discovered with ordinary diligence within a period of three years prior to the bringing of the suit."

In *Jackson* v. *Jackson, supra,* Jordan, J., at page 243 said that the time limited by the statute —

> "does not begin to run until after the discovery of the cause of action, or, as the authorities assert, from the time the discovery by the exercise of ordinary diligence might have been made."

It will be shown that in the present case the complainant fails to show the exercise of any diligence at all in discovering the alleged wrongful acts.

(6) Allegations of Fraudulent Concealment Must Be Specific and Certain.

Not only is the complainant obliged to show that the fraudulent concealment consisted of something in the nature of a trick or artifice purposely designed to conceal the cause of action, and that the cause of action could not have been discovered by the exercise of reasonable diligence, but all the allegations relative to the fraudulent concealment must be specific and certain, and the complainant cannot avoid the operation of the Statute of Limi-

tations by general allegations. He must point out the specific facts upon which he relies. It is not sufficient to say in general terms that the respondents fraudulently by actual misrepresentation concealed the cause of action. It is necessary to show what methods the respondents adopted and how the person wronged was misled thereby. *A fortiori* it must appear positively that the person wronged was actually misled by the fraudulent concealment, in other words that he relied upon the representations made by the wrong doer to his own damage.

The cases require a very strict adherence to the rule that charges of fraud must be definite and specific. See:

Stearns v. *Page* (1849), 7 How. 819, 829.
Moore v. *Greene* (1856), 19 How. 69.
Wood v. *Carpenter* (1879), 101 U. S. 135.
Hardt v. *Heidweyer*, 152 U. S. 547.
Strout v. *United Shoe Mach. Co.* (1913), (D. C. Mass.) 208 Fed. 646.
School District v. *Deweese* (1899), 93 Fed. 602.
Jackson v. *Jackson* (1898), 149 Ind. 238.
Brunson v. *Ballou* (1886), 70 Ia. 34.
Burke v. *Maguire* (Cal. 1908), 98 Pac. 21.

In *Wood* v. *Carpenter, supra*, the plaintiff filed a replication to a plea of the Statute of Limitations in which he set up that the defendant concealed the facts that his property had been conveyed in trust, misrepresented his insolvency, and that the plaintiff had no knowledge of the facts concealed until 1872, a few weeks before he brought this suit. A demurrer to this replication was sustained. Swayne, J., at pages 140, 143 said: —

> " In this class of cases the plaintiff is held to stringent rules of pleading and evidence, . . . *Stearns* v. *Page*, 7 How. 819, 829 . . . *Moore* v. *Greene et al.*, 19 id. 69, 72. . . .

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. . . .

"The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

In *Strout* v. *United Shoe Machinery Co.*, *supra*, Dodge, Cir. J., at page 651 said: —

"A plaintiff who, in reply to a defense setting up the statute of limitations, alleges fraudulent concealment of a cause of action by the defendant, is required to specify the fraud whereby such concealment was effected. It is not sufficient to allege generally that the defendant fraudulently concealed the cause of action, without further specification. This is one of the cases wherein a general allegation of fraud is not enough. Nor will specific allegations of frauds or falsehoods by the defendant suffice, unless concealment of the cause of action would necessarily follow from them. *Wood* v. *Carpenter*, 101 U. S. 135, 139."

In *Moore* v. *Greene*, *supra*, which was an appeal from the Circuit Court for the District of Rhode Island, McLean, J., at page 72 said: —

"When fraud is alleged as a ground to set aside a title, the statute does not begin to run until the fraud is discovered; and this is the ground on which the complainant asks relief. But, in such a case, the bill must be specific in stating the facts and circumstances which constitute the fraud; and also as to the time it was discovered. This is necessary to enable the defendants to meet the fraud, and the alleged time of its discovery."

In *Stearns* v. *Page, supra,* Grier, J., at page 829 said: —

"A complainant, seeking the aid of a court of chancery under such circumstances, must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment,— must specify how, when, and in what manner, it was perpetrated. The charges must be definite, and reasonably certain, capable of proof, and clearly proved. . . . And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered and what the discovery is."

In *Jackson* v. *Jackson, supra,* the court at page 242 said:

"The statute of limitation is recognized as one of repose and it has been frequently held by this court, in placing an interpretation upon the above section, that in order to bring a case within the concealment intended by its provisions, there must be something more alleged and proved than the mere silence or general declarations upon the part of the person said to have concealed the cause of action. There must have been some trick or artifice to prevent a discovery, or some material fact misstated to or concealed from the party by the means of some positive or affirmative act or declaration when inquiry was being made or information sought, and under such facts the operation of the statute is suspended, and does not begin to run until after the discovery of the cause of action, or, as the authorities assert, from the time the discovery by the exercise of ordinary diligence might have been made." . . .

"The pleading leaves us to indulge, in part, in speculation or inference, and in this respect violates the rule which requires that a party relying upon fraud must plead all the facts constituting the same,

for, as presumptions are in favor of fair dealing, nothing is to be taken by intendment or inference."

In *Burke* v. *Maguire, supra,* the declaration alleged that on the death of Hugh McDermott there came into the hands of Bridget McDermott $40,000 in money and $10,000 in notes and mortgages; that by false inventory and accounts she suppressed this and represented to the court and to the plaintiff that nothing came into her hands as executrix except what was listed in the inventory; that plaintiff, a legatee, received only a small portion of the legacy left him by the testator. The defendant, the administrator of Bridget McDermott, pleaded the Statute of Limitations and the plaintiff set up the fraudulent concealment.

Shaw, J., at page 25, said: —

> "It is not stated that plaintiffs believed the alleged false representations concerning the estate, nor that it was in reliance thereon that they suffered 14 years to elapse without the least diligence to learn the reason for the insufficiency of the estate to pay the liberal legacies provided in a will made so shortly before the death of the testator. It is the general rule that one who claims that his conduct has been influenced to his prejudice by alleged false statements of another must allege that he believed the false statements to be true and relied on them in his subsequent action relating to the subject thereof."

The foregoing authorities will be found to be of particular importance when consideration is given to the question as to what fraudulent concealment the complainant relies upon. It will be found that the complainant's original bill did not set forth sufficiently according to the rules of pleading above referred to the alleged fraudulent conceal-

ment, and that the only specific allegations with reference thereto are contained in the amendment to the bill of complaint. It will further be shown that the specific facts relied upon in the amendment to show concealment cannot be made to affect the respondent Smith in this present action.

(7) The Corporation was the Only Person Entitled to Sue on the Present Cause of Action until a Receiver was Appointed and then the Receiver could Only Sue in the Right of the Corporation.

The only party that can recover assets lost by a corporation through the negligence or misfeasance of its officers or directors is the corporation itself. A stockholder may bring a bill if the corporation will not sue, but his right is merely to set the judicial machinery in motion and the recovery is for the corporation.

3 Pomeroy's Eq. Jurisp. 2524, sec. 1095.

There the learned author says:

"The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff."

The distinction between the rights of the corporation or its receiver on the one side and its stockholders or credi-

tors on the other is also well brought out in the case of *Chesbrough* v. *Woodworth*, 244 U. S. 72, cited on page 12 of the complainant's brief, and in other cases cited in that case.

Stockholders or creditors may suffer a wrong for which they may recover, but in such case it is their own loss that they recover, not that suffered by the corporation. The receiver of a corporation cannot sue on a right of action belonging to stockholders or creditors individually or as a class. Such rights of action are not assets of the corporation.

See *Jackson* v. *Allen* (1882), 12 Fed. 454, 455 *et seq.* (C. C., S. D. N. Y.).
Mallon v. *Hyde* (1896), 76 Fed. 388 (C. C., D. Washington).
Simmons v. *Taylor* (1901), 106 Tenn. 729.
Childs v. *Adams* (1910), 43 Pa. Super. Ct. 239.

Furthermore the receiver in this case cannot represent creditors in any way that will help him, as the bank was still entirely solvent when all these respondents ceased to be directors. (Rec. p. 186.) Nor can he represent stockholders in any way that will help him, because the bill does not show that at the time this suit was brought there was any stockholder who was entitled to bring a suit in 1909 or 1910 against these appellees or had derived his stock from anyone who was so entitled in 1909 or 1910.

It is submitted, then, that the right of the complainant to maintain his bill against these six respondents must stand or fall with the right of the bank to do so. The carefully considered case of *Boyd* v. *Mutual Fire Association*, 116 Wis. 155, stands squarely for this proposition. It was a suit begun by creditors of an insolvent corporation and continued by its receiver. The court says: —

"This action, being one in the right of and in

behalf of the corporation, is open to any defence which the defendants might have urged, had the corporation itself brought the suit. The acts alleged against the officers are of misfeasance and malfeasance. No doubt can reasonably be entertained but that the corporation might have brought an action at law at any time within six years after the commission thereof. As between the corporation and its officers, the latter were liable in a straight action at law any time during the six years next after their shortcoming. It is not perceived how the fact that creditors must bring their suit in equity, when the corporation cannot or will not act, changes the relations of the parties. The creditors possess no greater right than the corporation. They are bound by the legal status of the parties, and cannot maintain this action unless the relation between the corporation and its officers is held to be such as to render the six-year statute of limitation inapplicable."

So also in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, a suit brought by a stockholder and creditor, joining the corporation, the assignee of which had refused to sue, Judge Lurton says: —

> "The Chancellor seems to have entertained the opinion that because a stockholder can alone sue in equity upon such a cause of action, that therefore this was one of that class of purely equitable actions against which the statute does not operate. But, as we have before seen, this kind of suit is, at best, but the suit of the corporation for its benefit and upon its right of action. If for any reason the corporation is estopped from suing, or its action is barred, the suit by the stockholders or creditors is likewise affected."

See also *Mason* v. *Henry*, 152 N. Y. 529 at page 537, to the same effect.

Many citations to the same effect might be added from cases already cited and other cases.

II. ASSIGNMENTS OF ERROR DISCUSSED.

(1) The Court Did Not Err as alleged in the First Assignment of Error by Disregarding the Claim that no Discovery or Disclosure of the Existence of the Cause of Action to the Bank would have any effect upon the Bar of the Statute of Limitations unless that Discovery occurred before August 3, 1910, six years before this suit was begun,—August 2, 1916—and that, therefore, the knowledge acquired by Directors after August 3, 1910, and the number of Directors who first became such after August 3, 1910, was Immaterial to the Question before the Court.

Counsel for complainant quote the opinion of the Circuit Court of Appeals to the effect that eleven new directors were chosen who had no part in the wrong doings charged against the retiring directors, and argues that because only three of these new directors came on the Board before August 3, 1910, the Court was, therefore, in error in charging the bank with notice. The question as to whether there were three new directors or one or eleven is immaterial.

Notice to one member of a Board of Directors, especially if it comes to him in the course of his official duties, is notice to the corporation.

See:

National Security Bank v. *Cushman* (1871), 121 Mass. 490.

Casco National Bank v. *John Clark* (1893), 139 N. Y. 307.

Bank of United States v. *Davis* (1842,) 2 Hill (N. Y.) 454.

North River Bank v. *Aymar* (1842), 3 Hill (N. Y.) 263.

Pittsburgh, Cincinnati & St. Louis R. R. Co. v. *Woolley* (1876), 12 Ky. 451.

City Bank of Columbus v. *Phillips* (1855), 22 Mo. 85.

4 Fletcher Cyc. of Corporations, page 3461.

1 Morse on Banking, 4th Edition, § 134.

See also note in *34 Harvard Law Review*, April, 1921, page 656.

The complainant cites no case holding that notice to one director would not be sufficient.

Counsel for complainant further argues that there is nothing alleged or which can be inferred to suggest a discovery by the bank or any representative of the bank. On the contrary it is positively stated in the bill of complaint that at all times after January 1, 1908, all the directors then in office had full knowledge of the affairs and financial condition of the bank and of the impairment of its surplus and capital and of the liability of its present and former directors, who had been such after June 15, 1906. (Record, p. 6, par. 14; p. 171, par. 34; p. 218, par. 184.) In other parts of the bill the complainant charges each of the later directors with liability for items arising before his term of office, because he did not take proceedings against the directors who had made the bad loans and investments. (Record, p. 172, par. 36, 37; p. 207, par. 96.)

Any one of these new directors could have brought suit against the retiring directors, had the Board refused to authorize such action. This is admitted by the complainant,— in fact is relied upon in the bill of complaint as a separate cause of action. No collusion or connection of any kind between the retiring directors and those later taking office is alleged.

It certainly cannot be held that there was any concealment from the bank when every member of its supreme governing body, including three entirely disinteresed men, was informed of the facts and of the existence of the cause of action against this respondent long before August 2, 1910.

As has already been shown under point I–7, page 25, *supra,* of this brief the banking corporation was the only person entitled to sue on the present cause of action until a receiver was appointed and then the receiver could only sue in the right of the bank. As there was no concealment from the bank, the Statute of Limitations is a complete bar.

(2) The Court Did Not Err as Alleged in the Second Assignment of Error in Disregarding the Fact that only Three New Directors were Added to the Board after the Defendants ceased to be Directors and before August 3, 1910.

As already shown under the preceding assignment, it is immaterial whether there were one, three or eleven new directors during the period in question. Notice to any one of the directors would have been sufficient.

(3) The Court Did Not Erroneously Assume as Alleged in the Third Assignment of Error that the New Directors Knew before August 3, 1910, of the Wrongs Committed by the Defendants.

The complainant argues that as both the Circuit Court of Appeals and the District Court rest their decisions mainly on the counteracting of the concealment by the knowledge acquired by the new directors, both courts must have assumed that the new directors knew before August 3, 1910, of the wrongs committed by the retired directors. The complainant contends that there is no basis for this assumption. On the contrary,, as already shown under the first assignment of error, the bill empha-

tically asserts and reiterates such knowledge on the part of all the directors.

For example, in paragraph 14, Record, page 6, there will be found the following allegation: —

> "FOURTEENTH: Said board of directors and each said member thereof during the period of his membership thereon, from June 15, 1906, to April 12, 1913, had full knowledge of the doings, affairs, and financial condition of said national banking association, and of the impairment aforesaid of the surplus and of the capital thereof."

See, also, page 171, paragraph 34; page 218, paragraph 184; page 172, paragraphs 36 and 37; page 207, paragraph 96.

(4) The Court Did Not Err as Alleged in the Fourth Assignment of Error in Holding that the Knowledge Acquired by the Several Directors Did [redacted] before August 3, 1910, Amount to Discovery by the Bank.

The complainant cites no authority for this proposition. The authorities, however, show that knowledge of one director, especially if gained in the course of his duty as a member of the Board, is notice to the corporation, *supra*, page 28.

(5) The Court Did Not Err as Alleged in the Fifth Assignment of Error in Holding that the Misrepresentations Made on the Books of the Bank and in the Reports to the Comptroller, to the Stockholders and to the General Public Relative to Matters During the Time in which the Defendants were Directors Ceased to be Misrepresentations when the Defendants Ceased to be Directors.

The Court did not rest its opinion simply on the ground that the misrepresentations ceased when the directors re-

tired from the Board, but also upon the fact that the bank had actual notice through the new directors, and that the alleged wrongful acts were discoverable by careful and competent bank examiners and employees of the bank itself. Any one of these grounds is sufficient upon which to rest the decision. But it is submitted that the Circuit Court of Appeals was clearly right in holding that the representations ceased when the directors retired from the Board. It is obvious that as in any case of alleged deceit the party relying upon it must not only show the falsity of the representation, but that he relied upon it. Such reliance must have taken place within the statutory period in order to prevent the statute from operating as a bar. In other words, it will not serve the complainant to show that the bank relied upon the books and reports as they existed prior to the time when the six directors retired from the Board. If between the time when the directors withdrew (that is to say, January 12, 1909, in the case of Mr. Smith), and August 3, 1910, when the statutory period began, new representations were made by others which were relied upon by the bank, the earlier representations became inoperative. This must clearly have been the case here. Assume that anyone representing the bank desired to determine its financial condition on July 1, 1910, or any later date, they certainly would not rely upon the balance sheet of January 1, 1909, or the reports made prior to that date, but upon the latest balance sheets and the most recent report. Certainly then the representations alleged to have been made by the six directors cannot be held to be operative after they ceased to be directors, especially after new reports were issued. Eight reports were made between January 12, 1909, the time when Mr. Smith withdrew from the Board, and August 3, 1910. (Record, p. 220.) If, as the Court of Appeals suggests, the effect of the representations on the

books and reports can be projected into the future after the resignation of the directors for seven years it can be projected for seventeen years, and the liability be continued indefinitely. Clearly there is no basis for such a doctrine when all connection between the retiring directors and the bank ceased and no collusion or conspiracy between the retiring and the new and continuing directors exists.

As already shown, the courts have uniformly held that the Statute of Limitations is a meritorious defense. Such statutes "promote repose by giving security and stability to human affairs. An important policy lies at their foundation." They have been said to be "vital to the welfare of society and are favored in the law". See the authorities cited under point I-1, page 11, *supra*.

The justice of the doctrine above adverted to is particularly obvious in this case. These six respondents are charged with liability based upon over twenty-one separate accounts and involving items running into the thousands. They extend over a period between 1906 and 1910. It took the receiver three years commencing in 1913 to gather together the material necessary for the framing of this bill. The task of a respondent who must begin many years later, without the facilities of an officer of the government in possession of all the bank's books and papers, is clearly much more difficult. The determination of financial responsibility and the revaluation of *all* the assets of the bank each time an excessive loan is charged is a stupendous task, not to be placed upon a defendant after lapse of time has obliterated or obscured the evidence except for cogent reasons. Furthermore the bill charges knowledge, the proof or disproof of which involves the examination into the state of each director's mind, and the handicap suffered particularly by the representative of a deceased director is, practically speaking, insurmountable.

Every reason for applying a distinct bar based upon lapse of time exists and the respondents should not be prejudiced in raising this defense by the sweeping allegations of the bill which they have now no opportunity to combat. The object of the statutory rule is to make it unnecessary even to examine the evidence.

(6) The Court Did Not Commit Error as Alleged in the Sixth Assignment of Error in Failing to Give Due Effect to the Allegations of Fact in the Bill of Complaint and Particularly to the Allegations of Fact in Paragraphs 38 to 40 and in Paragraphs 183 to 191 Setting Forth that each of these six Defendants had Fraudulently by Actual Misrepresentations Concealed the Existence of the Cause of Action in this Suit, and that it was First Discovered within Six Years Prior to the Filing of the Bill of Complaint.

The complainant urges that he has charged specifically in the bill that the defendants did "fraudulently, by actual misrepresentation", conceal from him the existence of the cause of action. Even this would not avail the complainant anything, if, as is elsewhere shown, the bank had knowledge in spite of the concealment, or if the bank might by the exercise of reasonable diligence have discovered the cause of action. (See *supra*, p. 17.) It is not important, therefore, that the bill alleges concealment unless it can negative knowledge, or opportunity for knowledge, of the existence of the cause of action. This it does not do.

But it is submitted that in spite of the allegations relied upon no fraudulent concealment, within the meaning of the statute and the authorities, has been shown, and particularly no concealment from the bank in whose place the receiver must stand.

The Statute of Limitations requires that the conceal-

ment shall be done "fraudulently, by actual misrepresentation". The authorities say that the concealment must be "by some trick or artifice". As was said by this Court in *Wood* v. *Carpenter, supra*, concealment by mere silence is not enough. See *supra*, page 16.

(a) The defendants are not guilty of actual misrepresentation by reason of the method in which the books were kept.

It was not the duty of the directors to keep the books of the bank, or even personally to examine them. Failure to do so was held in *Dresser* v. *Bates*, 250 Fed. 525, 251 U. S. 524, to be not even negligence. See also *Briggs* v. *Spaulding, supra*, at pages 162 and 163. *A fortiori* such negligence would not amount to fraud. But even assuming that the directors actually kept the books themselves or were personally responsible for their keeping, when a loan is made to a borrower it must necessarily be first put upon the books of the bank at the face value of the amount loaned. If it then or later becomes wholly or partly worthless an additional entry in the nature of a charge-off or write-down must be made upon the books. Failure to make such charge-off or write-down is inaction only and does not amount to "actual misrepresentation" nor to a "trick or artifice designed to conceal the cause of action". It is no more than "mere silence" and, as has been seen, mere silence is not sufficient to take the case out of the operation of the Statute of Limitations. The original entry of the loan on the books of the bank at its face value results necessarily from the making of the loan and is not in any sense a misrepresentation of value.

The case would be different undoubtedly if it were one where the loans were entirely fictitious. To enter such loans on the books of the bank in any amount would constitute an actual misrepresentation. It is clear from the

bill of complaint that nothing of this kind is charged, however, in the present case. The directors made the loan and acquired the investments in question negligently, not fraudulently. They did not enter into these transactions for profit to themselves or to anyone else. They were required under the law to be stockholders and they were dealing in part with their own funds. It cannot be claimed, therefore, that the loans and investments authorized by them were authorized with any malicious or fraudulent intention of misappropriating the funds of the bank. No such charge is made in the bill. The allegations of the bill are consistent only with negligent wrong-doing and this is the theory adopted by the pleader. See paragraph 15 of the bill, Record, page 7, where it is stated that the losses in question were suffered by reason of the fact that the defendants "failed and neglected to give to the affairs, business, assets and liabilities of said National Banking Association the time, diligence, attention, fidelity, prudence, intelligent interest and consideration which ordinarily careful men give and should give to such matters", clearly importing negligence, not fraud. This paragraph was, it is true, stricken out by the amendment, not on the ground that it was untrue but because the matters contained therein were set out in detail elsewhere. (Record, page 184, paragraph 50.) It is to be remembered in this connection also that not only were the loans that were made not fictitious or wholly worthless, but that in many instances according to the allegations of the bill could have been collected in full had due diligence been used subsequently by the directors later in office (see Record, pages 189 to 214), and in fact a large part of them were collected. As already shown also, the directors subsequently in office are charged with negligence for failing to make additional collections. (Record, page 222.)

(b) This defendant is not guilty of actual misrepresentation upon which the complainant can rely by reason of the making of reports.

The only other allegations with regard to false representations refer to the official reports attested by the individual directors. These reports, it seems clear, would cease to operate as misrepresentations after the directors retired from the Board and new reports had been made. As already shown, twelve such new reports were made after Mr. Smith retired and prior to August 3, 1910, the date when the Statute of Limitations commenced to run.

Furthermore, the only report attested by the respondent Smith was on November 12, 1906 (see Rec. p. 220, paragraphs 188 and 189), nearly ten years before suit was brought and nearly four years prior to the beginning of the statutory period. The complainant does not claim any fraudulent purpose existed prior to January 1, 1908. (Rec. p. 173, paragraph 38.) He has not charged that the capital and surplus of the bank was impaired to any substantial extent prior to January 1, 1908. (Rec. p. 4, paragraph 8.) Consequently the attesting of a report by Mr. Smith as early as November 12, 1906, would not in any way affect his liability.

(c) Inasmuch as the only person entitled to sue was originally the Bank, and later the Receiver in the right of the Bank, and as no misrepresentation as to the Bank is alleged, no misrepresentation exists on which the Receiver can rely.

The bank was solvent at all times while these defendants were in office.

The reports could not therefore operate as a representation to creditors. The stockholders had no right of action except a derivative one for the benefit of the corporation. Inasmuch also as the bill does not show that there are at the present time any stockholders who were stockholders

prior to January, 1910, the complainant as receiver of the corporation cannot claim to represent anyone but creditors in this suit, and there was no misrepresentation as to creditors so far as this respondent is concerned. It has already been shown that the bank was the only person entitled to sue on the present cause of action until a receiver was appointed, and then the receiver could only sue in the right of the bank (*supra*, p. 25). No concealment from the corporation, however, is shown by the bill of complaint. The bill does not allege any concealment from the corporation or any of its officers, or any misrepresentation made to it or them. The only fraudulent concealment alleged is from outsiders. On the contrary it is positively stated in the bill that at all times after January 1, 1908, all the directors then in office had full knowledge of the affairs and condition of the bank and of the impairment of its surplus and capital and of the liability of all its present and former directors who had been such after June 15, 1906. (Rec. p. 6, paragraph 14; p. 171, paragraph 34; p. 218, paragraph 184.) Inasmuch, therefore, as the receiver stands in the shoes of the corporation itself, and as there was no concealment from the corporation, there is no concealment at all upon which the receiver is entitled to rely.

(7) The Court Did Not Err as Alleged in the Seventh Assignment of Error in Assuming the Existence of Facts as to the Discovery of the Cause of Action and Opportunity therefor Contrary to the Allegations of Fact in the Bill of Complaint and Particularly to the Allegations of the 40th and of the 186th Paragraphs.

It has already been shown in the discussion of the first and third assignments of error that the corporation itself had actual knowledge of the financial condition of the

bank between the time of the retirement of the six directors and August 3, 1910. Such knowledge is positively alleged in the bill. (See *supra*, p. 31.) The court, therefore, made no error in assuming such actual knowledge. The opinion of the Circuit Court of Appeals also relies upon the fact that the condition of the bank was discoverable. The court says: —

> "The facts were also easily discoverable by competent and careful bank examiners."

We believe that this was a correct assumption. The statute governing the comptroller's powers and duties shows that he was not supposed to rely upon the books of the bank or the reports or the statements made by the officers of the bank. The statute in force previous to April 12, 1913, was Revised Statutes, Sec. 5240, as amended by the Act of February 19, 1875, Chapter 89 (United States Compiled Statutes, 1913, p. 4518), which so far as applicable is as follows: —

> "The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall as often as shall be deemed necessary or proper appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association and in doing so examine any of the officers or agents thereof on oath; and shall make a full and detailed report of the condition of the association to the comptroller."

With such powers it seems clear that the Comptroller of the Currency, under whose authority the present bill has been brought and under whom the receiver is acting, could by the exercise of reasonable diligence, or indeed of any diligence at all, have discovered the conditions com-

plained of in the bill of complaint by use of the powers conferred upon him by the above statute. Certainly he could have discovered sufficient facts to have put him upon inquiry had he exercised due diligence.

It is not, however, incumbent upon the respondents to show as a matter of defense that the facts were discoverable. Under all the authorities the burden is upon the complainant to show not only that the facts were not actually discovered but that they could not have been discovered by the exercise of reasonable diligence. (See *supra*, pp. 17 and 20.) There is not even an attempt in the bill of complaint to explain why the acts in question were not discovered.

(8) The Court Did Not Err in Failing as Alleged in the Eighth Assignment of Error to Give Effect to the Law that if a Cause of Action is once Fraudulently Concealed by the Defendant by Actual Misrepresentations the Time fixed by the Statute of Limitations as a Bar Does Not begin to Run as a Defense to it until the Existence of the Cause of Action is Discovered by the Party Entitled to Enforce It.

If the complainant means to suggest by the above assignment of error that in a case like the present one the Statute of Limitations does not commence to run until the person entitled to sue first discovers the cause of action, even if he has negligently omitted to make such discovery, we submit that it is not a correct statement of the rule of law. All the authorities hold, including those cited by the respondent in his brief, pages 16 and 17, that the Statute commences to run when the cause of action has been discovered or by the exercise of due diligence should have been discovered. We have also shown that there was not only actual discovery by the corporation itself, the only

party entitled to sue, but that the cause of action was discoverable, and that in any event the complainant has not sustained the burden of proving that the cause of action was not discoverable.

We also deny that there was in the present case any actual misrepresentation within the meaning of the statute for which these respondents are responsible. There was nothing in the nature of a trick or artifice employed to conceal the cause of action. At most there was only inaction or silence, neither of which is sufficient to prevent the running of the statutory period.

(9) The Court Did Not Err as Alleged in the Ninth Assignment of Error in Failing to Give Effect to the Alleged Doctrine of Law that the Time Fixed for the Statute of Limitations as a Bar Does Not Begin to Run for Directors of a National Bank Sued for Positive Acts Knowingly Done by them in Violation of their Fiduciary Duty to the Bank until the Cause of Action is Disclosed by them or is Discovered.

The complainant in this assignment of error apparently relies upon the proposition of law that directors of a corporation are trustees of an express trust and that therefore the Statute of Limitations does not operate as it would in the ordinary case. On page 20 of the complainant's brief, however, in discussing this ninth assignment of error, he states that the weight of authority is that the statute does not begin to run until the cause of action is discovered or should have been by the exercise of ordinary diligence. This proposition does not seem greatly to differ from the proposition of law already discussed. It has already been shown that the cause of action was discovered by the corporation prior to August 3, 1910, and certainly was discoverable before that date, and also that the burden is upon the complainant to show why it was

not discovered, which duty he has not assumed. The further discussion of this proposition of law seems almost unnecessary. The complainant speaks of this as being a case where the respondents were wrong-doers not dealing at arm's length with the corporation but as fiduciaries. This fiduciary relationship ceased, however, on January 12, 1909, in the case of Mr. Smith, one year and seven months prior to the time when the statutory period began to run. There was no longer any fiduciary relationship, so that if such relationship is sufficient to differentiate this case from any other, such difference ceased upon the retirement of the respondent from the board.

Insofar, however, as the doctrine of fiduciaries might be claimed to be applicable at all to the present case, it is submitted that directors of a national bank are not within this doctrine. The great weight of authority is that directors of a bank are not in the position of trustees under an express trust, and it is only in the case of trustees under an express trust that it has been held that the Statute of Limitations does not apply as in the case of the ordinary wrong-doer. That directors are not to be regarded as trustees under an express trust, see

Briggs v. *Spaulding, supra*, at page 147, semble.
Cooper v. *Hill, supra*.
Emerson v. *Gaither*, 103 Md. 564.
Cullen v. *Mining & Manufacturing Co.*, (Tenn.) 43 S. W. 693.
Williams v. *Halliard*, 38 N. J. Eq. 373.
Magale v. *Fornby*, 132 Ark. 289.
Cone v. *Dunham*, 59 Conn. 145, 148, 20 Atl. 311, 313.

The case of *Greenfield Savings Bank* v. *Abercrombie*, 211 Mass. 252, cited on complainant's brief, page 25, is not in point, since the court rests its decision upon the fact that

the trustees of a savings bank "stood as to the bank and its depositors in a position of trustees of a direct trust".

The cases of *Rankin* v. *Cooper* and *National Bank of Commerce* v. *Wade* cited by the complainant are not at all in point. In *Rankin* v. *Cooper* the decision was rested upon the proposition that at the time of the commission of the wrongful acts in question and afterwards until the appointment of a receiver, the defendants who were concerned therein constituted a majority if not the whole of the Board of Directors. In the present case the six directors concerned in this appeal had resigned before the statutory period commenced to run. *National Bank of Commerce* v. *Wade* was a case where the defendants were the managing officers of the bank and is, therefore, distinguishable. Furthermore, the action was commenced within three years of the time when the defendants gave up control of the bank to their successors and the case was therefore held not to be barred by the Statute of Limitations.

The complainant also urges under this assignment of error that the receiver represents the stockholders to some extent, but primarily the creditors, and that therefore the Statute of Limitations makes no impressive appeal. The true doctrine is the one already referred to, that the receiver stands in the place of the bank and that the receiver can, as to these six defendants in any event, stand in no better position than the bank would have stood had it brought suit. This is especially true since the bank was solvent and the rights of creditors had not accrued at the time when the last of the six directors withdrew from the Board. The Circuit Court of Appeals was clearly right in saying that "This fact negatives any possible contention, concerning the validity of which no opinion is intimated, that the receiver has, as against these defendants, any other or greater rights than accrued

to the corporation and through it to its stockholders." Even if the receiver at the present time represents creditors in any sense, there is no showing that any of the present creditors of the bank were such prior to January 12, 1909.

The complainant also urges that the Comptroller and the bank examiners were not required to look outside of the books of the bank. We think that the statute already referred to indicates the contrary and that it was clearly their duty to investigate the value of the security of the loans reported on the books of the bank, particularly those that were of long standing or which were large in amount. They would have at least learned sufficient, if the allegations of the bill are correct, to put them upon inquiry by interrogating the President of the Bank, who according to the allegations of the bill recommended and was responsible for the making of all of the bad loans and investments. (Record, p. 217, par. 176.) It is also claimed by the complainant that the negligence of these officials would not be important. While there is no authority cited either way upon this question, reason would seem to indicate that a receiver appointed by and acting under the Comptroller should be held to be barred by the negligence of the bank examiners.

The complainant also urges that an injustice would be perpetrated if directors could escape by reason of the lapse of one year and seven months, as in the case of Mr. Smith. It is submitted that the lapse of one day over and above the statutory period would be sufficient and should be sufficient to exonerate the defendants in a case like the present one. Six years would seem to be a sufficiently long time within which to allow conditions such as those relied upon in the bill of complaint to be discovered. The complainant is really contending, not for a statutory period of six years, but for a statutory period extending for six

years and in addition thereto for an unlimited time beyond the period of six years. There is not only no support in law, of course, for such a proposition, but its adoption as a principle of equity would be very unfortunate. As was said by the court in *Robinson* v. *Hall*, 63 Fed. 235, the courts in dealing with instances of negligence by the directors of banks "are under perplexing restraint lest they should by severity in their rulings make directorships repulsive to the class of men whose services are most needed". Take for example the case of the respondent Smith. He retired from the bank in January, 1909, nearly thirteen years ago. He died in February, 1919. Can the representatives of his estate be expected to be in a position at the present time, should the decision of the Circuit Court of Appeals be reversed, to try out the complicated issues in this case involving over 7,000 items relating to matters happening prior to 1909, involving questions of knowledge and intent upon which his representatives are in no position to offer evidence, and in a case where the ultimate liability will be affected by the handling of collections extending over a period of four years after he retired from the Board? It is submitted that to attain a result which would involve these hardships would be to perpetrate a gross injustice. If such became adopted as the doctrine of this Court no prudent man would be willing to accept a bank directorate.

(10) The Tenth Assignment of Error Alleging that the Court Should Not Decree that the Statute of Limitations Constituted a Defense for these Six Defendants or any of them and Should not have Dismissed the Bill of Complaint as to them sets up no Additional Reasons for a Reversal.

The matter relied upon in this assignment of error is merely reiteration of the reasons urged in the prior assignments of error.

(11) Discussion of the Eleventh Assignment of Error which Urges that if the Decree of the District Court were Not Final within the Terms of the Statute Governing Appeals, then the Dismissal of the Appeal Should be Without Prejudice.

The respondents leave the decision of this assignment of error to the discretion of the Court without argument.

CONCLUSION.

For the above reasons the complainant's appeal should be dismissed and the decree dismissing the bill of complaint against the respondents Edwin A. Smith, deceased, and Donald E. Jackson as executor, should be affirmed.

Respectfully submitted,

ARTHUR M. ALLEN,
for the Respondents,
EDWIN A. SMITH *and*
DONALD E. JACKSON, *his Executor.*

GREEN, HINCKLEY & ALLEN,
Attorneys for Respondents.

October, 1921.

SUBJECT INDEX

INDEX OF CASES

Supreme Court of the United States

No. 69.

OCTOBER TERM, 1921

RENSSELAER L. CURTIS, RECEIVER,
Complainant, Appellant

v.

JOHN J. CONNLY, ET AL.,
Respondents, Appellees.

BRIEF FOR THE RESPONDENT, OSCAR SWANSON.

This cause is before this Court upon the appeal of the Complainant from the decree entered March 4, 1920 by the Circuit Court of Appeals for the First Circuit affirming the decree of the District Court of the United States for the District of Rhode Island dismissing this Bill of Complaint as to this respondent on the ground that the action is barred by the Statute of Limitations of Rhode Island.

The points raised in this cause as now presented to this Court are as follows:

I. THE RIGHT OF THIS COMPLAINANT TO RECOVER AS AGAINST THIS RESPONDENT UNDER THE ALLEGATIONS OF THIS BILL AND THE AMENDMENT THERETO IS BARRED BY THE STATUTE OF LIMITATIONS.

II. THIS RESPONDENT UNDER THE ALLEGATIONS OF THE BILL AND THE AMENDMENT THERETO IS NOT GUILTY OF SUCH FRAUDULENT CONCEALMENT OF THIS CAUSE OF ACTION OR OF SUCH ACTUAL MISREPRESENTATION AS TO PREVENT THE RUNNING OF THE STATUTE OF LIMITATIONS IN HIS FAVOR.

III. THE EXISTENCE OF THIS CAUSE OF ACTION WAS DISCOVERED OR WAS DISCOVERABLE BY THE CORPORATION, THE ONLY PARTY WRONGED, MORE THAN SIX YEARS PRIOR TO THE FILING OF THIS BILL OF COMPLAINT.

The facts as regards the term of service of this respondent as Director of the Atlantic National Bank as admitted for the purpose of this hearing are as follows:

This respondent, Oscar Swanson, began to serve as Director of the Atlantic National Bank June 29, 1906, and continued to serve until January 12, 1909, when he ceased to be a Director of this Bank. This suit was started in August, 1916. It is evident therefore that more than seven years and six months elapsed from the time this respondent ceased to be a Director before this action was started seeking to hold this respondent Director with other Directors responsible for certain losses alleged to have been suffered by this Atlantic National Bank through acts or omissions of these various directors.

POINT I.

THE RIGHT OF THIS COMPLAINANT TO RECOVER AS AGAINST THIS RESPONDENT UNDER THE ALLEGATIONS OF THIS BILL AND THE AMENDMENT THERETO IS BARRED BY THE STATUTE OF LIMITATIONS.

ARGUMENT.

I.

The bill of complaint sets forth essentially an action to recover damages, the jurisdiction of the court of equity being obtained through grounds other than the relief sought, as the avoidance of a multiplicity of suits and the complexity of the facts as alleged.

The bill clearly shows that the purpose of this action is to recover damages for certain losses alleged to have been caused to this bank by certain Directors including this respondent.

By reason of the number of respondent directors and the complexity of the facts the complainant has seen fit to invoke the aid of the Court of Equity. It is clear that this is a case of concurrent jurisdiction of law and equity.

2.

Courts of equity in cases of concurrent jurisdiction not merely follow the analogy of, but act in obedience to, the statutes of limitations.

Courts of equity invariably decline to entertain causes of action brought after the time presented in the Statutes of Limitation where the corresponding or similar action if brought in a law court would be barred by this statute.

5 *Pomeroy Equity Jurisprudence*, 3d *edition Section* 20.

16 *Cyc. pages* 177 *and* 178.

Norris v. *Haggin*, 28 Fed. 275.

Hayden v. *Thompson et al.*, 71 Fed. 60.

Thompson v. *German Ins. Co.*, 76 Fed. 892.

Miles v. *Vivian et al.*, 79 Fed 848.
Kelly et al. v. *Boettcher et al.*, 85 Fed. 55.
Cooper v. *Hill*, 94 Fed. 582 at page 590.
Wilson v. *Plutus Mining Co.*, 174 Fed. 317.
Carroll v. *Green*, 92 U. S. 509.
Godden v. *Kimmell*, 99 U. S. 201.
Mercantile Natl. Bank v. *Carpenter*, 101 U. S. 567.
Wood v. *Carpenter*, 101 U. S. 135.
Norris v. *Haggin*, 136 U. S. 386.
Curtner v. *United States*, 149 U. S. 662.
McDonald v. *Thompson*, 184 U. S. 71.
Sperings Appeal, 71 Penn. State 11.

3.

The corresponding action at law applicable under the statement of facts as set forth in the bill and the amendment thereto would have been case.

See

Carroll v. *Green*, 92 U. S. 509.
Cockrill v. *Butler*, 78 Fed. 679.

The Statute of Limitations of the State of Rhode Island in regard to the action of the case is as follows:
Public Laws of 1909, Chap. 284, Section 3.

"Sec. 3. All actions of account, except on such accounts as concern trade or merchandise between merchant and merchant, their factors and servants, all actions of the case, except for words spoken, and for injuries to the person, all actions of debt founded upon any contract without specialty or brought for arrearage of rents, and all actions of detinue and replevin, shall

be commenced and sued within six years next after the cause of action shall accrue, and not after."

It is evident therefore that without more this respondent cannot be held in this cause, more than six years having elapsed since this action accrued.

4.

This respondent as director of this bank was not an express trustee so as to prevent the statute of limitations being a bar to this action.

It is claimed by the Complainant that this Respondent had "the affirmative obligation of a fiduciary" and therefore cannot escape the liability of his unlawful acts even tho the statutory period has run.

It is submitted that no case holds that a director of a National Bank is an express trustee. He holds legal title neither to the stock nor to the corporate property.

The cases cited by the Complainant do not support this claim of an express trusteeship. It is to be noted that we are not dealing with the case of a savings bank director, a vital distinction and one upon which many of the complainant's cases are easily distinguishable.

See Greenfield Saving Bank in Abercrombie, 211 Mass. 252, where the Court says, "this contention (bar of the Statute of Limitations) overlooks the fact which has been sufficiently shown that these defendants stood as to the bank and its depositors in a position of trustees of a direct trust." But there is nothing here in the case at bar to show that that relationship existed in this bank as to these directors.

We submit that Directors of a National Bank are at most quasi trustees and are in fact agents.

See

3 Pomeroy Equity Jurisprudence, 3d ed. Sections 1089 and 1090.

Emerson v. *Gaither*, 103 Md. 564.

Cooper v. *Hill*, 94 Fed. 582 at 590.

Briggs v. *Spaulding*, 141 U. S. 132.

Speidel v. *Henrici*, 120 U. S. 377.

But even if the directors of a bank have been held on the ground of a quasi-trusteeship or on the theory of a constructive trust, even then the benefit of the Statute is not barred to them.

The only cases where the benefit of the Statute of Limitations has been denied to Directors in cases of this character are

Rankin v. *Cooper*, 149 Fed. 1010.

National Bank of Commerce v. *Wade*, 84 Fed. 10.

In these cases and they are the only ones cited by the Complainant on this point, and the only ones discovered by us, the Court denied the plea of the Statute to the respondent directors because the bank continued in their control as directors and so the Statute was held not to run while the bank remained in their control.

But the complainant cannot bring the case at bar within this line of cases. For here we have the respondent leaving the board in January, 1909, with a board of twenty-one members. In 1910 there were only fifteen directors. Before Aug. 3, 1910, six years prior to the filing of the bill, three new directors were elected to the board. Subsequently seven more new directors were elected. So that always there was an independent innocent director on the board after this respondent resigned who could have and should have instituted this suit against this respondent.

Again it is to be noted that in the case at bar this respondent terminated his connection with the bank in 1909 and his fiduciary relation then ceased. After a trustee has terminated the trust relation, the statute of limitations begins to run.

See 2 *Perry on Trusts* 1413 Sec. 863
1415 Sec. 864

See Greenfield Savings Bank v. Abercrombie 211, Mass. 252 where the Court says

"The Statute of Limitations does not begin to run against the *cestui que* trust until they have learned of the trustees wrong doing or his practical repudiation of the trust and of the duties thereby imposed upon him."

In fact we have found no case nor has the complainant cited a case similar to the one at the bar where a respondent director of a bank has ever been held after the running of the statutory period when he had been off the board of directors leaving the control of the bank in other hands for more than the number of years required by the Statute of Limitations.

5.

The protection of the statute of limitations should be afforded this respondent in view of the facts of this case.

This respondent is clearly justified in availing himself of the defense of the Statute of Limitations. If there ever was a case where the evil of pressing stale claims warrants the existence of the Statute of Limitations, such is the case at bar. The bill sets forth twenty-one accounts running from 1907 to 1909, as far as this respondent is concerned; hundreds of loans are set forth in paragraph twenty of the bill,

pages 9 to 158 of the Record as participated in by this respondent. The guilt of this respondent depends largely on the credit responsibility of these borrowers. This can only be shown by the financial condition of these various concerns at the time the loans were made. To put this respondent to this burden after these years have elapsed of gathering together this evidence with the likelihood and almost certainty that much of the evidence necessary to show the condition of these borrowers is now lost or unavoidable, is to deny him the very protection the Statute contemplates.

See *Wood* v. *Carpenter*, 101 U. S. 135 at page 139 where the Court says

> "Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary mere delay extending to the limit prescribed is itself a conclusive bar."

Again in *Bell* v. *Morrison* v. *Pet.* 351, at page 360, the Court says:

> "It has often been matter of regret in modern times that in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light as an unjust and discredited defence it had received such support as would have made it what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law not designed merely to raise a presumption of payment of a just debt from lapse of

time, but to afford security against stale demands after the true state of the transaction may have been forgotten or be incapable of explanation by reason of the death or removal of witnesses. It has manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them."

See also *Campbell* v. *Haverhill* 155 U. S. 610 where the above is quoted with approval.

Again the claim of the complainant that this respondent should be denied the protection of the statute of limitations because the creditors are the ones to suffer if this respondent is to escape is clearly wrong and not justified by the facts stated in the bill. For at the time this respondent resigned, the capital of this bank according to the allegations of the bill, was impaired only to the extent of about fifteen per cent., see paragraph 190 of the bill, page 220 of the Record. So that the bank was amply able to pay at this time every creditor in full.

POINT II.

THIS RESPONDENT IS NOT GUILTY OF SUCH FRAUDULENT CONCEALMENT OF THIS CAUSE OF ACTION OR OF SUCH ACTUAL MISREPRESENTATION AS TO PREVENT THE RUNNING OF THE STATUTE OF LIMITATIONS IN HIS FAVOR.

1.

The running of the statute of limitations was not barred by the provisions of the Rhode Island statutes.

The General Laws of the State of Rhode Island 1909, Chapter 264, Sec. 7, provides as follows:

> "If any person liable to an action by another shall fraudulently by actual misrepresentation conceal from him the existence of the cause of such action said cause of action shall be deemed to accrue against the person so liable therefor at the time when the person entitled to sue shall first discover its existence."

The Complainant claims that under the provisions of this statute and the allegations of the bill and the amendment thereto the Statute of Limitations did not run in favor of this respondent so as now to bar this action.

2.

Allegations of the bill as regards any concealment by this respondent.

It is evident from an examination of this Bill that the only allegations in the bill of any facts or circumstances which could be used as the basis of arguing that this Court should reject the plea of the Statute of Limitations or of laches as raised by this respondent are found in paragraphs 38, 39 and 40.

These allegations are as follows:

Par. 38, Page 173

That "SAID BOARD OF DIRECTORS FROM AND AFTER JAN. 1, 1908" for the purpose of concealing the impairment of capital as alleged, directed, approved and caused the books to be so kept

> "as to show many of said improper, doubtful and worthless loans, overdrafts, and investments at and as having the value of the amounts so loaned, overdrawn and invested as aforesaid without off-charge and deprecia-

tion and wholly in consequence thereof the books, accounts, etc., of said association stated the assets thereof to be greatly in excess of what in fact they were."

Paragraph 39, page 173, states "SAID BOARD OF DIRECTORS AS SUCH" for purposes aforesaid caused said false books to be exhibited to the examiners and said false statements and false reports were filed with the Comptroller from time to time from JANUARY 1, 1908, and published generally.

Paragraph 40, page 173, states "SAID BOARD OF DIRECTORS AS SUCH" concealed from the Comptroller of the Currency and from the creditors of the bank and from the public generally the fact of the improper, doubtful and worthless loans, overdrafts and investments of aforesaid and the impairment aforesaid of the surplus and of the capital and of the liability of the directors therefor, and that none of the said matters were discovered by anyone other than the said directors before the year 1913 and many of them were not discovered until the latter part of 1915.

After the decision of the Court below on the motions to dismiss this bill, the complainant attempts to meet the objections raised to the insufficiency and incompleteness of these allegations, and in the amendment to this bill, paragraphs 184 through 191 were added in the attempt to show what is claimed to be the fraudulent concealment and acutal misrepresentation by this respondent.

It is submitted that these added allegations still do not show any such concealment or fraud, or misrepresentation as will bar this respondent from the benefit of the statute.

Paragraph 184, page 218, is as follows:

"From Jan. 1, 1908 until the suspension of the bank in April, 1913, although the uncertainty and worthlessness of the various items complained of was known to

all the directors at the time in office, these loans and investments were carried at their full value on the books of the bank, and this fact was known to all of the directors at the time being in office and approved by them with the following exceptions:"

Paragraph 185, page 218, sets forth some twenty-five items that disappeared as assets from the accounts of the bank from 1909 through 1912.

In paragraph 186, page 219, the complainant sets forth that in consequence of the over valuation of the loans and investments, the impairment of the surplus and capital did not appear on the books and could not be discovered by the Comptroller of the Currency or his examiners, or the creditors or the stockholders or the persons dealing therewith or any other person.

The falsity of this claim is apparent and will be referred to later.

In paragraph 187, page 219, appears the following:

"All the directors from time to time knew that the reports of the bank to the Comptroller of the Currency would be made up from these books and would contain the same over-statement and misrepresentation of the assets of the bank, and they authorized the officers of the bank to make these reports in this way and took no action to have said reports show the true condition of the assets of said bank in the particulars aforesaid, and they knew at the time that the true condition of the bank and of these loans and investments would be and was thereby misrepresented and concealed."

Paragraph 191, page 221, is as follows:

"If these loans and investments had been truly stated on the accounts and reports of the bank, the impairment of the surplus and the capital, and the liability of the

directors for making the loans and investments complained of would have become known to the Comptroller of the Currency and his examiners, and to the stockholders and creditors of the bank years before the suspension of the bank and before the lapse of any statutory period of limitation to the recovery of any of the items complained of."

All these allegations in effect amount to this that bad investment and loans were carried on the books at their full face value: that therefore by reason of thus carrying these loans on the books at their full value the impairment of the bank's surplus and capital did not appear and was not and could not be discovered by the Comptroller, his examiners or anyone else.

To prevent the statute of limitations running in favor of this respondent this complainant must show by suitable averments:

1. That the concealment was by this respondent.

2. That the cause of action was concealed from the party entitled to sue.

3. That there was actual fraudulent misrepresentation by this respondent which resulted in the concealment.

Whenever a suit in equity is started after the statutory time as fixed by the analogous Statute of Limitations has expired the burden is on the complainant to show in his bill by suitable averments the existence of such special circumstances as would prevent the Statute of Limitations from applying.

See

Wilson v. *Plutus Mining Co.*, 174 Fed. 317 at pages 320 and 321.
Kelly v. *Boettcher*, 85 Fed. 55 at page 62.
Horton v. *Stegmyer*, 175 Fed. 756 at page 759.

Cutter v. *Iowa Water Co.*, 128 Fed. 505.
Boynton v. *Haggart*, 120 Fed. 819 at 830.
Wood v. *Carpenter*, 101 U. S. 135.

3.

There was no concealment by this respondent after he left the board in January, 1909.

The only allegations of concealment of this cause by this respondent are the allegations as above set forth.

It is submitted that full opportunity was furnished the succeeding directors to discover this alleged over-valuation. The books were in the bank open to the inspection of the directors at any time. The cashier and other officers also, knew or should have known of this alleged over-valuation. Knowledge or opportunity or knowledge of the cashier is knowledge of the bank.

The bill also shows that these alleged illegal loans were renewed repeatedly mostly at four months intervals by the succeeding boards of directors, and as this respondent was off the board after 1909, the later directors are liable for these renewals. As far as the loans are concerned for the making of which this respondent is sought to be held, an analysis of the bill shows that there was no actual concealment of the essential facts. The concealment here as in the investments was the making of worthless loans and the carrying of these loans at their full value. The general allegations of the bill as to the worthlessness of these loans is not borne out by the more specific statements in the bill.

Paragraphs 97 through 160 of the Bill, Record, pages 208 to 214 set forth in detail the financial condition of these borrowers. In many of the instances the borrowers to whom the loans were made for which this respondent is sought to

be held are stated to have had "ample assets," "could have been forced to pay." The total amount of the claims thus admitted to be good and not worthless is over $90,000. This respondent should not be compelled to go to trial on the general allegations of the bill when the more specific allegations of the bill show him free from blame. Each loan and each investment involves a separate claim. Admitting the difficulties of trying to state a case in general terms against all these respondents for the offenses as set forth in this bill nevertheless, this respondent is entitled to the same rights of clear pleading and definite statement as if he were sued alone. And he certainly should not be put to the expense of preparing his defense against the general charges of this bill when in many instances, the bill does not show any wrong doing or any concealment thereof. Certainly if the borrowers had assets and could have paid, the loans were not worthless and this respondent when he left the board, left in the case of many of the items, loans to financially responsible borrowers.

And in this connection see paragraph 37 of the bill, page 172.

> "The financial condition of many of the recipients of said dividends, loans and overdrafts and the financial condition of many of said directors liable as aforesaid, and the condition of many of said investments was such that if said board of directors and the several members thereof had taken action with reasonable promptness to realize for said national banking association upon said several resources, a large part or the whole of said loss would have been saved or recovered to said national banking association together with the interest and income of which said national banking association has been deprived upon the sums paid out as aforesaid and

many of the directors and persons, firms and corporations had assets with which to satisfy said liabilities if realized upon, before they were exhausted by other liabilities and losses."

It is also to be noted that if this respondent is to be held as to concealment as alleged after 1909, it is on the assumption that he would have consented to the continued carrying these assets at their alleged over-valuation. The fact that new information, change of circumstances etc., might have induced him to demand of the then Board to charge off certain loans, or investments and thus present the condition of the Bank in a different light than the Board from 1909 on actually did, this possibility, this possible defence, the complainant denies this respondent.

4.

The alleged misrepresentations of the respondent ceased to be misrepresentations binding or affecting this respondent after his retirement from the board in 1909.

The complainant claims that these misrepresentations once made continued on down through 1913 and even to this day. It is submitted that in the very nature of the operation of a commercial bank, this could not be true. These overvaluations made by this respondent up to Jan. 1909 were nullified and made of no effect by the acts of the succeeding boards. These loans were constantly renewed usually at four month intervals. Frequent reports were made to the Comptroller, five a year, and in these reports the bank's condition was set out in full. It is not conceivable that statements as to values in two reports to the Comptroller attested to by this respondent, one in Jan., 1907, and

the other in May, 1907, serve to conceal this cause of action in 1910 from the Comptroller or the Stockholders or anyone then in interest. Moreover the argument that these misrepresentations continue down to to-day, is nullified by the other allegations of the bill. For admitting there was a mistatement as to the true worth of the assets of the bank as regards the particular items charged against this respondent nevertheless nearly one-half of the items charged against this respondent disappeared from the assets or were charged off by the Board by Aug. 13, 1910, which is certainly notice enough to anyone of the error or misstatement, if such it was in the prior statements of the bank's condition. See paragraph 185 of the bill, page 218 of the Record. But the broad argument of the complainant overlooks this point also and this respondent is sought to be held for the full amount, altho by the very terms of the complainant's claim and argument, he cannot show that this respondent concealed or made any misrepresentation as to many of the items set forth in paragraph 67 of the bill, page 197 of the record, where the claim against this respondent is itemized.

To show the falsity of the complainant's claim, attention is called to the only investment made by respondent for which recovery is claimed. This is the item of the Whittle Dye Works' bonds $42,500. December 12 and 26, 1907. There is no claim that the purchase of these bonds was concealed or was hidden in any way or that there was anything wrong other than that this was not the proper kind of investment for a bank to make and was of a highly speculative and doubtful value or worthless. See paragraph 28 of bill, page 170. The nature of these bonds, the worth of the maker of the bonds, the character of the business of the maker, all facts pertinent to determining the worth of these bonds and

their value were always open for the bank, its officials and any one to discover. They were listed for all that appears in the assets of the bank. Every examination after December 12, 1907, and every report to the Comptroller must have showed these bonds, and there were thirteen reports before Aug. 3, 1910, and at least five examinations each year. The complainant argues that because these bonds were carried at $42,500 instead of $10,000, or perhaps $10, that therefore the cause of action against this respondent for purchasing these bonds at this cost of $42,500 was not discovered by anyone till 1915. It is difficult to see how there was any concealment at all as to this bond purchase. The carrying of these bonds at a valuation higher than their worth, if such was done after Jan. 1909, when this respondent left the board was not his act, and he should not be held liable. It is also to be noted that this respondent made no report to the Comptroller as to this item. The only reports signed by this respondent were made on Jan. 26, 1907, and May 20, 1907. Paragraph 189 of the bill, page 220. So that as to this item amounting to nearly one-fifth of the total claimed of this respondent, there was no such concealment as is claimed the bill sets forth.

5.

Concealment by a third party is no bar to the running of the statute.

It is submitted that the concealment as set forth consisting of false overstatements as to the assets of the Bank, after the time this respondent retired as Director was in no sense his act but was the act of the subsequent or succeeding directors. His acts of alleged concealment stopped January 12, 1909, when this respondent retired from the Board and

were in fact nullified and rendered of no importance by the later statements issued by the succeeding Boards of Directors and by the subsequent entries in the books of the bank after his retirement as Director.

As to the point of law that the concealment of the cause of action must be the concealment by the party in whose behalf the Statute of Limitations is pleaded. See

Hayden v. *Thompson*, 71 Fed. 60 at p. 70.

Simmons, Trustee v. *Baynard*, 30 Fed. 532 at p. 538.

Norris v. *Haggin*, 136 U. S. 386 at p. 393.

6.

There was and could be no concealment from the party entitled to sue as is evident from the allegations of the bill itself.

The Board of Directors are alleged to have had full knowledge or means of knowledge of all of these facts.

Paragraph 34 of the bill, page 171, is as follows:

> "Said board of directors as such and each said member thereof, at all times after January 1, 1908, could and would by the exercise of reasonable diligence, observation and inquiry have discovered, was chargeable with notice, and did in fact know that said dividends and improper, doubtful and worthless loans and investments should be immediately recalled, disposed of, converted, realized upon and charged off and that said board of directors and each member thereof and all former members thereof who have been members thereof since June 15, 1906 were liable as aforesaid to said national banking association because of the making and retention of said dividends, loans, overdrafts and investments."

Having full knowledge of these facts upon which the complainant bases his case, they should have sued this respond-

ent to recover these sums of money. The complainant himself alleges this failure to sue and non-action of the Directors as a ground of complaint and a cause of the loss.

See Par. 191, page 221.

As to the succeeding directors, the books were in the bank, the over-statements, carried along as they were from time to time as appears in the Bill, were spread on the books and were before the then Board for their examination and consideration all the time up to April, 1913. There is no allegation that these facts were not known by the succeeding directors or that these facts were concealed from them. In fact it is just the opposite and the succeeding directors had actual knowledge.

It is submitted that this complainant cannot disregard the failure of the Board of Directors of this Bank after this respondent's retirement in 1909 to sue him for these sums alleged to have been lost through the responsibility of the respondent Oscar Swanson.

The complainant has not shown what connection this respondent had with the succeeding Board's failure to sue. He is not alleged to have controlled or directed their action, and in the absence of any such allegations as these, he cannot be deprived of the benefit of the running of the Statute of Limitations in his favor in this case.

In this connection see

Collier v. *Goessling*, 160 Fed. 604 at page 611

where the Court in discussing the applicability of the Statute of Limitations in an equitable action held that to start the statute running three factors must be found, first, some one capable of being sued; 2d, some one to sue; and 3d, a tribunal open for such suit.

The complainant cannot claim the benefit of the full

knowledge of all these facts by these directors as alleged in the bill and at the same time avoid the consequences of that knowledge in so far as it negatives the claim of concealment of this cause of action as against this respondent.

As showing the knowledge of the succeeding Board of Directors, attention is called to paragraph 185 of the Amendment to the bill where the complainant sets forth in detail a list of items which disappeared from the assets of the bank all after this respondent left the Board and of the 25 accounts charged off twenty of them were running during the time this respondent was on the board.

7.

If the corporation or board of directors did not sue or refused to sue any stockholder could have brought suit.

See

> *Pomeroy Equity Jurisprudence* Vol. 3 (3d ed.) Sec. 1095.
> *Hodges* v. *New England Screw* Co., 1 R. I. 312.
> *Hazard* v. *Durant*, 11 R. I. 195.
> *Huff* v. *Union Bank*, 173 Fed. 333.

The allegation that the alleged over-valuation was not and could not be discovered by the Stockholders is weakened considerably when we consider the other allegations of the bill that all the succeeding directors, all of whom were stockholders, knew of this over-valuation. Also it must be remembered that during all the time from 1909 to 1913 there were cashiers and assistant cashiers, tellers and other officers of the bank to whom these facts must have been known and through whom stockholders might have and should have learned of these alleged irregularities. If the respondent could have been sued therefor by these stockholders of the

bank at any time after the commission of the acts, the statute began running from the time the action accrued and this action is now long since barred; the Receiver being in no different position than the stockholders as to the right to bring a suit of this nature.

8.

The Comptroller of the Currency himself must have had or should have had full knowledge of this overvaluation and of the excessive loans as alleged in the said bill.

Sec. 9832 of the U. S. Compiled Statutes 1913 under the title "National Banks" (Rev. Statutes Sec. 5240 as amended) provides for the examination of every national bank at least twice in each calendar year, and "oftener if considered necessary," by examiners appointed by the Comptroller of the Currency.

This Court must assume that this law was obeyed. Therefore there must have been at least thirteen examinations by the U. S. Bank Examiner of this Atlantic National Bank from June 1906 to April 1913.

This examination by these U. S. Bank Examiners is to be full and thorough and the examiner "shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency."

See Sec. 9832 as above noted.

Sec. 9767 title "National Bank" U. S. Comp. Statutes 1913 (Rev. Statutes Sec. 5205) provides for the appointment of a receiver by the Comptroller of the Currency of

> "every association whose capital stock shall be impaired by losses or otherwise."

There is not the slightest suggestion in this Bill in any paragraph, that the Comptroller of the Currency ever called the Directors' attention to this bank's condition. There is

no explanation why or how this alleged over-valuation or these alleged excessive loans could have escaped these Examiners, and it is submitted that in view of these repeated examinations, full notice must have been had or could have been had by the Comptroller and through him to the Stockholders of this Bank of this alleged condition of this Bank and its assets and of the excessive loans. Opportunity for knowledge is the same as knowledge.

16 Cyc. 171.
Norris v. *Haggin*, 28 Fed. 275.
Wood v. *Carpenter*, 101 U. S. 135.

Moreover as far as this respondent is concerned the bill distinctly avoids claiming that there was any concealment by this respondent as to the Comptroller through any false reports. Paragraph 39 of the bill, page 173.

> "THIRTY-NINTH: Said board of directors, as such, with the information and knowledge aforesaid and for the purpose aforesaid, directed, approved, and caused said false books to be exhibited from time to time from JANUARY 1, 1908 and thereafter to said examiners and said false reports and false financial statements to be filed from time to time with the Comptroller of the Currency and to be published and distributed from time to time in newspapers of general circulation."

The only reports to the comptroller signed by this respondent were the two of Jan. 27, 1907, and May 20, 1907. See Paragraph 189 of the bill, page 220. It is evident therefore that one of the basic elements of the complainant's claim that this respondent concealed this cause of action through false reports to the Comptroller is not borne out by the bill itself. The whole argument of the complainants as to any concealment through these false reports does not and cannot be applied to this respondent.

It is submitted, therefore, that the bare allegation of the concealment of this action from the Comptroller without

explanation as to how and in what respects or without any explanation as to why this bank's condition was not discovered by these repeated examinations, or why these excessive loans could not have been readily discovered by these examinations, is not sufficient to stop the Statute of Limitations running, as far as this respondent is concerned.

9.

The receiver himself must have had full knowledge of the facts alleged in this bill long before the statutory period had elapsed.

The receiver was appointed in April, 1913, (see paragraph 1, page 2.) This action was started in August 1916, over three years and four months later. No explanation of this delay on the Receiver's part is shown. In paragraph 191 it is stated that if the loans and investments had been truly stated, the impairment of the surplus and the liability would have been known to the Comptroller years before the suspension and before the lapse of any statutory period of limitation.

The Receiver however is the direct appointee of the Comptroller, answerable to him and under his charge and control. The books and all the records of the bank were in the hands of this Receiver. The books themselves gave full information as to these loans, amounts, dates, etc. How can it be said that there was any concealment as against the Comptroller in light of this long period of unexplained inaction on the part of the Receiver and his superior, the Comptroller? Why should this respondent be denied the benefit of the statute, where as in this case there is such an unexplained inaction as regards bringing suit against this respondent?

10.

There was no actual fraudulent misrepresentation by this respondent which resulted in the concealment of this cause of action.

As has been shown above the allegations of concealment of this cause of action by this respondent consist wholly of the charge of over-valuation of the assets of this bank and the carrying of this over-valuation on the books of the bank. These charges, however as applied to this respondent who left the board in 1909 fall far short of showing any fraud or misrepresentation as to the assets of the bank from 1909 to 1913 when the Receiver was appointed. Even if improper loans were made before 1909, even if improper investments were made before 1909, even if the books and statements before that time did show any over-valuation, the bill expressly charges all the succeeding directors with full knowledge of all of these alleged illegal acts of this respondent. It shows no connection between this respondent and the Board after he left in 1909. It does not charge him with controlling or directing the action of the Board after he retired. And what is most important a careful study of the list of Directors as given in paragraph 10 of the bill shows that after 1909 and from 1910 till 1913 on, there were on the Board from three to five directors who are not named as respondents and yet are alleged to have full knowledge of all of these improper loans and investments, (see particularly paragraphs 14 and 34 of the Bill).

The complainant has maintained that Par. 188 of the bill, page 220 of the Record, clearly alleges fraud. And in fact this paragraph contains the only allegations that can be said to even approximate a charge of fraud.

Paragraph 188, page 220, is as follows:

"The forms for these reports contained blanks for the

entry of bad and doubtful assets of the character of these loans, but notwithstanding this these loans were entered in the items of good assets at the full amount."

But as against this respondent this paragraph clearly does not apply. For as has been shown it is only the reports since Jan. 1st, 1908 that the complainant alleges are erroneous, see Paragraph 39, page 173, and this respondent did not make or sign any report after May, 1907. Par. 189, page 220. Moreover after the report of May 20, 1907, there were twenty-nine reports to the Comptroller, twenty-two of them made after this respondent left the board.

And again, it is submitted that the allegations of paragraph 188 do not charge actual fraud. They cover at most mere neglect.

The attesting as correct of a bank report which includes over-valuation of assets may be negligence, or carelessness. It is not the positive self-concealing acts necessary to prevent the statute running.

See *Bates* v. *Preble*, 151 U. S. 149.

The vital element of fraud such as to bar the statute, that is, secrecy, is lacking here. The loans were openly made, the books disclose full details as to dates and amounts, the credit value of these loans, the worth of the investments were and could be easily ascertained and verified by the succeeding directors, by the officers of the bank or by the examiners for the Comptroller. There was nothing secret about these alleged illegal acts of this respondent.

See *Bates* v. *Preble*, 151 U. S. 149.

The concealment must be by some positive act of the defendant, mere silence or failure to inform the party wronged of the cause of action is not enough.

See *Bates* v. *Preble, supra.*

See also *Reynolds* v. *Hennessy*, 17 R. I. 169, at page 178, where the Court uses the expression "active additional fraud has prevented discovery."

It is submitted that the case at bar shows no positive act No conspiracy between this respondent and the other directors is shown, nor is this respondent shown to have benefited himself by this over-valuation.

See complainant's brief, page 34, where it is stated "It is not alleged that the acts of the appellees were done in conspiracy with the other respondents."

POINT III.

THE EXISTENCE OF THIS CAUSE OF ACTION WAS DISCOVERED, OR WAS DISCOVERABLE, BY THE CORPORATION, THE ONLY PARTY WRONGED, MORE THAN SIX YEARS PRIOR TO THE FILING OF THIS BILL OF COMPLAINT.

The complainant urges strongly that this action was not discovered by the party wronged or by anyone till 1915 and therefore this respondent cannot avail himself of the defense of the Statute of Limitations.

The only party entitled to sue this respondent for the wrongs claimed to have been committed was the Bank itself, the corporation. The bank at the time this respondent left the board was solvent. The then total loss was only $150,000, see paragraph 190 of the bill, page 220. The capital stock was $225,000, the surplus in 1909, $112,500, paragraph 5 of the Bill, page 3, of the Record.

From January 1, 1909, through August 3, 1910, there were three new directors of the board of this Bank, Budlong,

chosen January 12, 1909, Kahn and John R. Dennis, chosen January 11, 1910, paragraph 10 of the bill, Record page 5. The complainants brief urges strongly that these new directors did not know and could not be assumed to know of the condition of the bank and the making of the bad loans and investments by this respondent and his associates. Attention however is again called to the strong positive allegations of paragraph 34 of the bill, page 171:

> "Each member (of the board) at all times after Jan. 1, 1908 did in fact know that said dividends, improper, doubtful and worthless loans and investments should be immediately recalled, disposed of, converted, realized upon and charged off; and that all former members since June 15, 1906 were liable as aforesaid to said national banking association because of the making and retention of said dividends, loans, overdrafts and investments."

And see also paragraph 184 of the bill, page 218:

> "From Jan. 1, 1908, until the suspension of the bank in April, 1913, altho the uncertainty and worthlessness of the various items complained of was known to all of the directors at the time in office these loans were carried at their full value on the books of the bank, and this fact was known to all of the directors at the time being in office."

Nothing could be stronger than these two paragraphs as showing full knowledge of these three new directors as to all these matters for which this respondent Swanson is sought to be held. Therefore it is claimed that the wrongs and right of action against this respondent was known to at least three innocent independent directors none of whom were in any way responsible for the acts done.

This seems to us a complete answer to the claim of the

complainant that this cause of action was not discovered till 1915.

In addition the members of the board who were on with this respondent and who stayed on after he left also had full knowledge of these matters. It is submitted that this respondent should not be denied the benefit of this knowledge of these directors also. No conspiracy with these directors is claimed, no control or influence by this respondent is shown to have existed or attempted. When he left the board in January, 1909, all connection with the bank ceased. He should not be held responsible for the failure of the board to sue him for these bad loans and investments. But even if it is claimed that the knowledge of these alleged guilty co-directors is not knowledge of the bank, yet as above pointed out there were still three new innocent directors after 1909 and prior to August 3, 1910, with full knowledge of all the facts. Certainly the knowledge of these three directors is notice to the bank and therefore this cause of action against this respondent was discovered by the party wronged more than six years prior to bringing this action.

See 14 *Corpus Juris*, pp. 485 and 486.

Paul Steam System Co. v. *Paul*, 129 Fed. 757.

SUMMARY.

It is respectfully urged therefore that this appeal be dismissed and the decree of the Court below dismissing this bill as against the respondent Oscar Swanson be affirmed:

1st. Because the cause of action, if any, is barred by the Statute of Limitation as appears by said Bill and amendment.

2d. Because no sufficient grounds are set forth to show

why this cause of action is not barred by the said Statute of Limitations.

3d. Because it appears that there was and could be no concealment by this respondent of this cause of action after his retirement from the Board of Directors in January, 1909.

4th. Because it appears that this cause of action was not concealed from the Board of Directors in office after January 12th, 1909,—the party not only entitled to sue but under legal obligations to sue if complainant's allegations are true.

5th. Because it does not appear that this cause of action was concealed from the stockholders of this bank,—parties in interest, also entitled to sue this respondent upon the allegations of this Bill.

6th. Because it appears that this cause of action was discovered by the corporation, the only party wronged, more than six years prior to the filing of the Bill of Complaint.

7th. Because it appears that this cause of action could not have been concealed from the Comptroller of Currency, as the semi-annual examinations of the United States Bank Examiners should have disclosed any overvaluation of assets, the only method of concealment alleged in the Bill and Amendment.

8th. Because it does not appear in and by said Bill of Complaint and Amendment that the alleged concealment of this cause of action was the result of the fraudulent actual misrepresentation of this respondent.

Respectfully submitted,

EDWARD A. STOCKWELL,

for the Respondent

OSCAR SWANSON.

In the Supreme Court of the United States

No. 69

OCTOBER TERM, 1921

RENSSELAER L. CURTIS, Receiver,
Complainant, Appellant,

v.

JOHN J. CONNLY, ET AL.,
Respondents, Appellees.

BRIEF FOR APPELLEES
Connly, Wellman and Dennis.

William W. Moss,
1511 Turks Head Building,
Providence, Rhode Island,
Attorney for Appellees
Connly and Wellman.

Percy W. Gardner,
[illegible] Turks Head Building,
Providence, Rhode Island,
Attorney for Appellee
John R. Dennis, Adm'r.

October, 1921.

In the Supreme Court of the United States

No. 69

OCTOBER TERM, 1921

RENSSELAER L. CURTIS, Receiver,
Complainant, Appellant,

v.

JOHN J. CONNLY, ET AL.,
Respondents, Appellees.

BRIEF FOR APPELLEES
Connly, Wellman and Dennis.

William W. Moss,
1511 Turks Head Building,
Providence, Rhode Island,
Attorney for Appellees
Connly and Wellman.

Percy W. Gardner,
402 Turks Head Building,
Providence, Rhode Island,
Attorney for Appellee
John R. Dennis, Adm'r.

October, 1921.

SUBJECT INDEX

LIST OF CASES

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921. No. 69.

RENSSELAER L. CURTIS, RECEIVER,
Complainant, Appellant

v.

JOHN J. CONNLY ET ALS.,
Respondents, Appellees

BRIEF FOR RESPONDENTS-APPELLEES JOHN J. CONNLY, D. HENRY WELLMAN AND JOHN R. DENNIS, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. DENNIS, UPON COMPLAINANT'S APPEAL FROM THE FINAL DECREE ENTERED MARCH 4, 1920, BY THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AFFIRMING THE DECREES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND, BY WHICH THE BILL OF COMPLAINT WAS DISMISSED AS TO THESE RESPONDENTS.

STATEMENT.

This is a suit in equity brought in the District Court of the United States for the District of Rhode Island by the receiver of the Atlantic National Bank, of Providence, R. I., against said Connly, Wellman and Arthur W. Dennis and many other persons for alleged wrongful conduct as directors of the bank.

The bill was filed August 2, 1916. It showed that these three respondents ceased to be directors more than six years before, the respondent Connly on January 12, 1909, and the others on January 10 and 11, 1910, and alleged nothing against

them thereafter. They and three other respondents, similarly situated, therefore filed motions to dismiss the bill as to them as barred by the Rhode Island statute of limitations, which fixes a period of six years for the corresponding legal cause of action, as all parties admit.

These motions were granted, after hearing, by the District Court and decrees were entered dismissing the bill accordingly. On appeal by the complainant to the Circuit Court of Appeals for the First Circuit and after hearing, these decrees were affirmed in an opinion and decree entered March 4, 1920, and given on pages 249-252 of the record. From this latter decree the complainant has appealed to this Court, his assignment of errors being found on pages 253-255 of the record.

So far as involved in this appeal, the only liability charged in the bill against these respondents is for knowingly authorizing the making and carrying of improper loans and investments, which caused losses to the bank. The bill does not charge that in so doing they acted fraudulently, with intent to benefit themselves, directly or indirectly, or any one else, or to injure the bank or its creditors or with any other improper intent. It does not charge, either directly or by implication, any collusion, conspiracy, combination or agreement of any kind among any of the directors. For all that appears, each director acted on his own volition in everything, except so far as he may have been influenced by the respondent Metcalf, president of the bank, who presented each loan and investment to the board (Record, p. 217, par. 176).

From paragraph 53 of the bill (Record, p. 186) it would appear that the unimpaired capital and surplus of the bank was about $140,000, when the first of these three respondents retired, and about $110,000 when the other two retired. Hence it may be taken that the rights of no creditor had then been impaired and that therefore the receiver, as against these respondents at least, does not represent creditors and has no other or greater rights than accrued to the corporation and through it to its stockholders. The Circuit Court of Appeals

so found in its opinion (p. 250) and as no assignment of error has been directed to this finding, it may be taken as settled.

The Rhode Island statute of limitations contains the following proviso (General Laws, Ch. 284):

> "*Sec. 7.* If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence."

To take advantage of this proviso and thus enable him to say that the cause of action against each of these respondents did not accrue before August 2, 1910, the complainant relies upon certain allegations of his bill as showing such fraudulent concealment of the cause of action.

The bill alleges that the books of the bank were so kept as to show many of the bad loans and investments at their full face value and were exhibited from time to time to the bank examiners (p. 173, par. 38). It does not charge that any particular directors caused this to be done, but only that the board, as such, did so. Paragraph 184 (p. 218) is as follows:

> "From January 1, 1908, until the suspension of the bank in April, 1913, although the uncertainty and worthlessness of the various items complained of was known to all of the directors at the time in office, these loans and investments were carried at their full value on the books of the bank, and this fact was known to all of the directors at the time being in office, and approved by them, with the following exceptions:"

The next paragraph then sets out various items as charged off on specified dates.

The bill also alleges that the board of directors, as such, and each of its members had the purpose of concealing any impairment of the surplus and capital of the bank from the Comptroller of the Currency and his examiners and the creditors and customers of the bank, without mentioning stockholders. It then alleges that the board of directors, as

such, caused reports and statements showing such false valuations of loans and investments to be made, filed with the Comptroller and published and thus concealed the facts and the liability of the directors from the bank's creditors and the public generally; and that none of these matters were discovered by anyone other than the directors before the year 1913 (p. 173, par. 38-40).

The bill further alleges that all the directors from time to time in office knew that the reports would be so made and authorized them to be so made and knew that the true condition of the bank would be thus misrepresented and concealed (p. 219, par. 187); that five of these reports were made every year and that certain directors signed certain reports (p. 220, par. 189). It further states that the impairment of capital and surplus could not be and was not discovered *from the books* (p. 219, par. 186); and that if the assets of the bank had been correctly valued in its books and reports, such impairment and the liability of the directors would have been known to the Comptroller and his examiners and to the stockholders and creditors of the bank years before its suspension (p. 221, par. 191).

No attempt is made to show any active concealment from the bank itself, its directors or officers, but only non-disclosure (p. 172, par. 36). And as already shown, all the directors at the time in office, from January 1, 1908, on, are charged with knowledge of the uncertainty and worthlessness of the items complained of (p. 218, par. 184). Moreover each director in office from time to time is said to have had full knowledge of all matters up to that time and of the liability therefor of the other directors then or previously in office and each respondent is charged with liability for failing "to have steps taken or action begun to obtain the repayment of the items complained of loaned or invested before he became a director, *or to compel the directors responsible therefor to make these items good to the bank*" (p. 222, par. 192).

It appears from the bill that certain new directors came on in place of these respondents and the three others who left

the board with them, and that there were later changes from time to time. Until the early fall of 1911, a majority of the board continued to be composed of directors who had served with these respondents, but after that time the new directors formed a majority of the board until the suspension of the bank in April, 1913 (p. 4, par. 10).

The Circuit Court of Appeals found that the bank, through its directors, both old and new, had knowledge of the cause of action against these respondents and failed for more than six years to bring suit and that therefore the action is barred, whether the question be tested under the strict provision of the Rhode Island statute or the broader and more flexible equitable rule. It further found that the misrepresentations by these respondents ceased when they ceased to be directors and that they did not in fact conceal the true condition from either the old or the new directors. It refused to recognize the doctrine contended for by the appellant, that, "irrespective of concealment, the directors, as knowing and positive wrongdoers in a fiduciary position, cannot set up the statute of limitations for any period prior to disclosure by them of the cause of action or discovery thereof by the parties wronged," as either sound in law or applicable to the facts of this case.

The appellant now contends that the statute is not a bar: *first*, because of the concealment; and *second*, because of the above doctrine.

PRELIMINARY STATEMENT OF APPELLEES' POSITION.

I. This Case is Governed by the Proviso in the Rhode Island Statute of Limitations.

The first thing to be kept in mind is that this is not a suit against a number of persons who are charged with any collusion, conspiracy or agreement among themselves. Each defendant is charged with a distinct and separate liability and the case is simply a combination of numerous separate actions

brought together in equity to avoid multiplicity and on account of the complexity of the matters involved.

The appellant's counsel agree with this view in their discussion of the eleventh assignment of error and it is only on this view that the Court has jurisdiction to hear this appeal at this time. Therefore for the purpose of this brief this point will be taken as settled.

From this it follows that each respondent is entitled to the same rights and defenses, including that of the statute of limitations, as if he had been sued alone.

If brought alone, the case against any of these directors could and would naturally have been an action at law in the nature of trespass on the case.

> *Emerson* v. *Gaither*, 103 Md. 564.
> *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630.
> *Corsicana Nat'l Bank* v. *Johnson*, 251 U. S. 68.
> *Kelly* v. *Dolan*, 233 Fed. 635.
>
> Also most of cases cited later.

It is well settled in Rhode Island and in other states that in cases of concurrent jurisdiction courts of equity not merely follow the analogy of the statutes of limitations applicable to the corresponding actions at law, but act in obedience thereto.

> *Atwood* v. *R. I. Agricultural Bank*, 2 R. I. 191.
> *People* v. *Equitable Etc. Society*, 124 N. Y. App. Div. 714.
> *Figge* v. *Bergenthal*, 130 Wis. 594.
> 3 Cook on Corporations, 7th ed., 2632, § 732.

In the first of these cases, a suit in equity against stockholders, it was argued that they were trustees. The court denies this and adds (p. 197):

> "But even if they were so, it would not affect this case, for the statute of limitations runs against trustees, where there is a concurrent jurisdiction at law and equity."

In *Figge* v. *Bergenthal*, *supra*, at page 621, the court says:

> "Where the remedy at law and in equity are concurrent upon the same state of facts, the action in

> equity is barred, irrespective of the discovery of the facts constituting the fraud, when the action at law is barred."

It is well settled that a federal court sitting in any particular state in an equity case of concurrent jurisdiction, as well as in a law case, will apply the statute of limitations of that state, whether the case is brought under a state law or under a United States law.

Carroll v. *Green*, 92 U. S. 509.
National Bank v. *Carpenter*, 101 U. S. 567.
Bates v. *Preble*, 151 U. S. 149.
Campbell v. *Haverhill*, 155 U. S. 610.
Baker v. *Cummings*, 169 U. S. 189, 206.
Percy v. *Cockrill*, 53 Fed. 872.
Hayden v. *Thompson*, 71 Fed. 60.
Thompson v. *German Ins. Co.*, 76 Fed. 892.
Miles v. *Vivian*, 79 Fed. 848, 852.
See also *Pratt* v. *Northam*, 5 Mason, 95.

The first of these cases was a suit in equity by creditors of an insolvent banking corporation against its stockholders under a clause in its charter which upon its failure rendered them individually liable for any sums, not exceeding double the value of their respective shares, which might be needed to pay its debts. The defense set up was the South Carolina statute of limitations which required actions upon the case and actions of debt grounded upon any contract without specialty to be brought within four years. It is held that if an action had been brought at law, it would have been an action of the case, not in debt, because the damages were not liquidated and that even if it could be in debt, it would not be debt grounded upon a specialty, and that therefore the action at law would have been barred because not brought within four years. The court then says (p. 516):

> "If a claim like that of the appellees sued at law would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it."

Cases dealing specifically with suits like the present one against directors of corporations will be cited and discussed later in connection with the assignment of errors.

It follows from the above rules that this case is governed by the Rhode Island statute of limitations, including the proviso defining what sort of concealment will prevent the statute from running, not mere passive non-disclosure but affirmative fraudulent concealment, by actual misrepresentation and from the person entitled to sue.

II. There was no Concealment by Actual Misrepresentation from the Person Entitled to Sue.

1. The banking corporation was the only person entitled to sue on the present cause of action until a receiver was appointed and then the receiver could only sue in the right of the bank.

In applying the proviso in the Rhode Island statute, the cause of action involved in this case is clearly for the alleged misconduct of the directors in misapplying the funds of the bank. The charges as to fraud by concealment were clearly added to the bill in order to meet the defense of the statute. From such misapplication of funds the loss would fall directly on the corporation and only through it upon stockholders and creditors. The wrong would be a wrong only to the bank directly and the right to recover for it from the guilty directors would be an asset of the bank.

It is true that if a corporation will not sue to realize on such an asset, one or more stockholders may sue, but in that event the corporation must be joined either as a complainant or respondent and any recovery will go to the corporation. If the corporation's right to recover is gone, the suit cannot be maintained. The only right that the stockholders have is to set the judicial machinery in motion, if the corporation itself either actually or constructively refuses to do so.

3 Pomeroy's Eq. Jurisp. 4th ed., 2524, § 1095.

There the learned author says:

> "The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the

> cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff."

On the other hand, fraudulent misrepresentation as to the condition of a corporation may cause direct loss to purchasers of stock or creditors, and if one of them is thus damaged, he has his own right of action against those who are responsible for such misrepresentation. In such a case it would be his own loss that he would recover and not that of the corporation. The receiver of the corporation could not sue on such a right of action, which would not be an asset of the corporation.

Stockholders or creditors suffering a direct loss on account of fraudulent misrepresentation by directors who have misapplied the funds of their corporation have their own causes of action, which may or may not be barred according to circumstances, without regard to whether the corporation's right to recover from the guilty directors is barred or not. The corporation would have a right of action against later directors who wrongfully failed to sue the guilty directors until too late; but its cause of action against the earlier directors would be lost by the running of the statutory period, unless such fraudulent concealment from the corporation as the statute requires is shown, whether or not the stockholders or creditors have lost their right to sue on their own causes of action.

The distinction between the rights of the corporation or its receiver on one side and its stockholders or creditors on the other is well brought out in the case of *Chesbrough* v. *Woodworth*, 244 U. S. 72, cited on pages 12 and 33 of the appellant's brief, and in other cases cited in that case.

Even if he could otherwise do so, the receiver in this case, as already shown, cannot represent creditors in any way that will help him, as against these respondents, because the bank was still entirely solvent when they ceased to be directors (Record, p. 186, par. 53; p. 250). Nor can he represent stockholders in any way that will help him, because the bill does not show that at the time this suit was brought there was any stockholder who was entitled to bring a suit in 1909 or 1910 against these appellees or who had derived his stock from any one who was so entitled in 1909 or 1910.

It is submitted, then, that the right of the complainant to maintain his bill against these respondents must stand or fall with the right of the bank to do so. The carefully considered case of *Boyd* v. *Mutual Fire Association*, 116 Wis. 155, stands squarely for this proposition. It was a suit begun by creditors of an insolvent corporation and continued by its receiver. The court says (p. 178):

> "This action, being one in the right of and in behalf of the corporation, is open to any defense which the defendants might have urged, had the corporation itself brought the suit. The acts alleged against the officers are of misfeasance and malfeasance. No doubt can reasonably be entertained but that the corporation might have brought an action at law at any time within six years after the commission thereof. As between the corporation and its officers, the latter were liable in a straight action at law any time during the six years next after their shortcoming. It is not perceived how the fact that creditors must bring their suit in equity, when the corporation cannot or will not act, changes the relations of the parties. The creditors possess no greater right than the corporation. They are bound by the legal status of the parties, and cannot maintain this action *unless* the relation between the corporation and its officers is held to be such as to render the six-year statute of limitation inapplicable."

So also in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, a suit brought by a stockholder and creditor, joining the

corporation, the assignee of which had refused to sue, Judge Lurton says (p. 648):

> "The Chancellor seems to have entertained the opinion that because a stockholder can alone sue in equity upon such a cause of action, that therefore this was one of that class of purely equitable actions against which the statute does not operate. But, as we have before seen, this kind of suit is, at best, but the suit of the corporation for its benefit and upon its right of action. If for any reason the corporation is estopped from suing, or its action is barred, the suit by the stockholders or creditors is likewise affected."

See also to the same effect:

Bates v. *Boyce's Estate*, 135 Mich. 540.
Mason v. *Henry*, 152 N. Y. 529, 537.

2. No concealment from the corporation is shown by the bill.

The bill in this case does not allege any active concealment from the corporation or any of its officers, nor any misrepresentation to it or them, but merely non-disclosure. The only fraudulent concealment that it purports to charge is from outsiders. As to the directors, the bill repeatedly and specifically states that they had full knowledge at all times. This subject will be further discussed in connection with the assignment of errors.

3. The concealment was not of the kind required by the statute.

The false representation charged against these respondents is only as to the valuations put upon certain loans and investments. Such statements have always been considered matters of opinion rather than of fact and therefore hardly constitute such actual misrepresentation as the statute contemplates.

There is no showing in the bill that any false valuations in the books, reports and statements of the bank actually deceived anybody or affirmatively prevented anybody from discovering the alleged causes of action against these respondents. The fact that true statements would have shown that poor loans and investments had been made is not enough. Moreover, as

to stockholders no fraud is charged against these respondents, as it is not alleged that any particular directors had any intent to conceal the truth from stockholders.

Finally there is nothing to show that the reports made while these respondents were directors had any effect in concealing the true state of the bank from anybody as late as August 2, 1910. They were so highly temporary in character and were superseded by so many later reports before that date that there is no reason to believe that they prevented discovery of the alleged causes of action until that time, and it is not charged that they did.

This point will be somewhat elaborated in the discussion of the assignment of errors.

DISCUSSION OF THE ASSIGNMENT OF ERRORS.

I. The Court did not in its Opinion Disregard the Fact that no Discovery or Disclosure of the Existence of the Cause of Action to the Bank Would Have any Effect Upon the Bar of the Statute of Limitations Unless that Discovery Occurred Before August 3, 1910, and that Therefore the Knowledge Acquired by Directors after that Date and the Number of Directors who First Became such Thereafter was Immaterial to the Question Before the Court.

The Circuit Court of Appeals found from the bill that after the withdrawal of the six directors who ceased to be such in January, 1909 and 1910, every director remaining or succeeding knew of the wrongs to the bank participated in by these six and is charged by the bill with additional liability for failure to collect from them damages therefor; that no collusion between these retiring directors and the other old directors or the new directors is alleged; and that therefore the bank knew of the cause of action against them and failed for more than six years to bring suit (p. 250).

This can only mean that the bank through its directors, both the continuing and the new directors, had knowledge of the cause of action for more than six years before the suit was brought, that is, from a period before August 2, 1910. These findings are fully supported by the allegations of the bill and the authorities cited by the court.

1 Morse on Banks, 4th ed., § 134.
10 Cyc. 1057. (See 14a C. J. 485).
Nat'l Security Bank v. *Cushman*, 121 Mass. 490.
See also *Arthur* v. *Harrington*, 211 Fed. 215, 218.

The decree appealed from rests solidly on these findings. It is true that the court also calls attention to the fact that of the directors who served after these respondents retired from the board at least eleven were new directors who had had no part in the wrong-doings charged against the retiring directors. In doing so there is not the slightest reason to believe that the court was unmindful of the fact that not all of these new directors were chosen before August 3, 1910.

The object of the court evidently was to call attention to the fact that not only did all the old directors know of the cause of action, but that from the time when the first of the six directors in question retired, down to the suspension of the bank, there were always from one to eleven new directors on the board who had had no part in the wrong-doings charged against the six, but who knew all about them. Thus there were always, from a date more than six years before the suit was brought down to the suspension of the bank, directors who cannot even be presumed to have had any interest against having suit brought against the six retiring directors and who could at any time have brought suit themselves, in behalf of the corporation, if it would not do so.

The appellant himself asserts that any one of them could have done so, for he charges every later director with liability for not having suit brought against the earlier ones and his co-directors, and there seems to be no doubt of the correctness of the assertion. Under certain circumstances it may even be the *duty*

of a director to bring suit against co-directors, who form a majority of the board and are managing the affairs of the corporation in an unlawful manner.

Joint Stock Discount Co. v. *Brown*, L. R., 8 Eq. 381, at 403.

Northern Trust Co. v. *Butchart*, 35 Dom. Law Rep. 169, at 175.

Magee on Banks and Banking, 3d. ed., 98.

In the former of these cases it is held that a director who concurred in the first steps of an illegal proceeding on the part of the directors by which its funds were diverted to an *ultra vires* purpose, who afterwards protested to some of them against going further with it, but who took no further measures to prevent its being carried out, was liable with the rest. The court (James, V. C., p. 403) says that if he could not have prevented it in any other way, it was his duty to go to the Court of Chancery with a bill to stop it:

> "Then it is said, 'What was he to do? Was he to have filed a bill to prevent the directors carrying out what they thought was authorized by the first resolution?' All I can say is this, if he could have done it in no other way, it was his duty as a director, knowing what was going on, not to have remained quiescent, or acquiescent, which is much the same thing, in what his brother directors were doing; but to have filed a bill, supposing that a bill was necessary . . . in the last resort, he might have come to the Court of Chancery and stopped the thing in a moment."

There is no reason for contending that the court disregarded the fact that knowledge by the bank of the existence of the cause of action, to be material in this case, must have been had before August 3, 1910, and therefore there is no merit in this assignment of error.

II. The Court Did Not Disregard the Fact that Only Three New Directors were Added to the Board After These Respondents Ceased to be Directors and Before August 3, 1910.

As already shown under the first assignment of error, there is no reason to believe that the court overlooked the fact that in order to bar this suit the statute must have begun to run against it before August 3, 1910. It was the very question that the court was deciding and it found that the bank had full notice of the cause of action against these respondents from the time they retired from the board.

Nor is there any ground for saying that the Circuit Court of Appeals and the District Court must have overlooked the fact that only three new directors came on thereafter and before August 3, 1910. Just when each new director was chosen was certainly clearly called to the attention of the courts in the bill and in the briefs filed.

Moreover, the decision of the court is not mainly rested on the fact that there were new directors on the board and it is hard to see what difference it could make whether before August 3, 1910, there were three new directors or a dozen. Even one director could bring proceedings for the corporation.

Attention is called in the appellant's brief to the fact that two of these three new directors, Kahn and Budlong, are not sued and that Kahn ceased to be a director November 4, 1910. What importance these statements have it is hard to see, since on the same day when Kahn retired there were chosen two new directors, Baldwin and Gifford, who remained on the board to the end, and no distinction is made in the bill, with reference to their knowledge of the matters complained of, between those directors who are sued and those who are not.

III. The Court Did Not Erroneously Assume that the New Directors had Knowledge Before August 3, 1910, of the Alleged Wrongs Committed by these Respondents.

The finding of the court on this point was not based on assumption or inference, as is argued for the appellant. On

the contrary it was based on numerous express and specific allegations in the bill of complaint.

After giving, in paragraph 10 (p. 4), a list of all the directors of the bank from June 15, 1906, to the close of business on April 12, 1913, the bill in paragraph 11 states that "said board of directors, as such, and each member thereof" elected certain officers, and in paragraph 12 states that "each of said directors" took an oath that he would perform his duties as such, and in paragraph 13 that "every director . . . for the time being in office" was subject to all the obligations and duties of directors of a national bank.

Then paragraph 14 states:

> "Said board of directors and each said member thereof during the period of his membership thereon, from June 15, 1906, to April 12, 1913, had full knowledge of the doings, affairs, and financial condition of said national banking association, and of the impairment aforesaid of the surplus and of the capital thereof."

Then paragraph 15 states:

> "Said board of directors, as such, and each member thereof from time to time during the period of his membership thereon from June 15, 1906, to April 12, 1913, has, in violation of the obligation assumed by him as a director of a national banking association and of the duty imposed upon him as such director by the common law and by the Acts of Congress, knowingly and utterly and wilfully failed and neglected to give to the affairs, business, assets and liabilities of said national banking association the time, diligence, attention, fidelity, prudence, intelligent interest and consideration which ordinarily careful men give and should give to such matters, and thereby said board of directors, and each said member thereof, has caused said national banking association to lose large sums of money and said national banking association has thereby lost a sum in excess of eight hundred thousand (800,000) dollars of the exact amount of which the complainant is ignorant, and for which sum of eight hundred thousand (800,000) dollars and over, the respondents are accountable to the complainant as receiver as aforesaid."

It is true that this paragraph was stricken out by paragraph 50 of the amendment, but this was only "because the matters therein referred to are set out in detail in other paragraphs of the bill of complaint so that said paragraph adds nothing thereto." (p. 184). It shows, however, the theory on which the whole bill is framed and it shows clearly, when taken in connection with the other paragraphs just mentioned, that in the bill "said board of directors and each said member thereof" means the board of directors and each member thereof from time to time, as given in the list in paragraph 10.

Paragraph 34 (p. 171) is as follows:

> "Said board of directors, as such, and each said member thereof, at all times after January 1, 1908, could and would by the exercise of reasonable diligence, observation and inquiry have discovered, was chargeable with notice, and did in fact know that said dividends and improper, doubtful, and worthless loans, and investments should be immediately recalled, disposed of, converted, realized upon, and charged off, and that said board of directors and each member thereof and all former members thereof who had been members thereof since June 15, 1906, were liable as aforesaid to said national banking association because of the making and retention of said dividends, loans, overdrafts, and investments."

Then paragraph 184 (p. 218), as already shown, states that "from January 1, 1908, until the suspension of the bank in April, 1913, . . . the uncertainty and worthlessness of the various items complained of was known to all of the directors at the time in office." Since the only concealment that the bill purports to charge is as to the values of these same items, it is clear from this paragraph alone that there was at no time between these dates any concealment from any of the directors.

By paragraphs 36, 37 and 96 (pp. 172, 207) the complainant charges each of the directors with liability as to those bad loans and investments made before they respectively became directors "for his failure to take proceedings on account of such loans and investments against the directors who made the

same and were liable therefor and were financially able to respond."

In all these paragraphs there is no basis for the argument that it might have taken new directors seven or even nineteen months to learn the facts. They are alleged to have known them at all times during their respective terms of office. The complainant cannot claim the benefit of this in holding new directors and yet ignore it when the question is one of preventing the statute of limitations from running in favor of old directors. He cannot have it both ways.

Counsel for the appellant, on page 7 of their brief, say that "the bill makes positive allegations of concealment and of non-discovery until 1913 and thereafter by *any one except the directors responsible therefor.*" This is flatly against the paragraphs above referred to, and those cited to support it do not do so. Paragraph 40 (p. 173) simply says that "none of said matters were discovered by anyone other than said directors before the year 1913," meaning evidently all the directors in office from time to time, and not merely those who authorized any particular bad loans and investments. And paragraph 186 (p. 219) simply says that the impairment of the surplus and capital of the bank could not be and was not discovered *from its books* by any one except the directors responsible therefor. It could be, and according to other paragraphs of the bill it was, discovered from other sources of information.

IV. The Knowledge Acquired by the Several New Directors Amounted to Discovery by the Bank Before August 3, 1910.

The authorities cited by the court and above given show that notice to even one director as such is sufficient and it should be kept in mind that during the time between the retirement of these respondents and August 3, 1910, not only did three new directors have full knowledge, but also all the remaining directors, for whose failure to sue them these respondents cannot be held responsible. Hence there is no merit in this assignment of error.

V. The Misrepresentations Made on the Books of the Bank and in its Reports, During the Time in Which these Respondents were Directors, Ceased when these Respondents Ceased to be Directors.

These respondents made no representations of any kind after they retired from the board and the false valuations in the books and reports for which they are charged with responsibility are not shown to have been of any effect in concealing the true state of the bank from anybody after that time. A false statement may be such as to remain effective for the purpose of concealment indefinitely or it may be such as to be thus effective for only a brief term.

The statements charged against these respondents were clearly of the latter kind. The assets of a national bank are continuously changing, the loans especially being always for very short periods, and even the same loan or investment may be good at one time and bad a month later and *vice versa*. They are constantly being revalued on its books, statements and reports. For this reason frequent reports are required, at least five in each year, and no one is expected to rely or ought to rely upon any report after it has been superseded by a later one.

In the present case the bill shows (p. 220, par. 189) that the last report signed by the respondent Connly was on September 27, 1908; by the respondent Wellman on February 5, 1909; and by the respondent Dennis on August 22, 1907. It shows also that after the first of them retired from the board and before August 2, 1910, eight reports were made and that three of these were made after the other two of these respondents retired. Under these circumstances it cannot be fairly found that any false statements made by these respondents were of any effect to cause concealment from any one after they respectively ceased to be directors.

VI. The Court did not Err in Failing to Give Full Effect to the Allegations of Fact in the Bill, Purporting to Set Forth that the Respondents, by Actual Misrepresentations, Concealed the Existence of the Cause of Action and that it was First Discovered Within Six Years Prior to the Filing of the Bill.

On the contrary the court gave careful consideration to these allegations, but found that the alleged misrepresentations by these respondents ceased to be operative as such when they ceased to be directors, and that the existence of the cause of action was not concealed from the party entitled to sue thereon, namely the corporation, which at all times thereafter had notice of the existence of such cause of action.

Moreover, the concealment alleged is not of the nature required by the statute to prevent it from running in favor of any particular defendant. That must be concealment by actual misrepresentation, fraudulently made by that defendant himself, and the representation must conceal the cause of action from the person entitled to sue thereon. That it conceals it from some one else who is interested therein will not suffice. Nor will concealment by a third person do.

Thorne v. *Heard*, (1895) A. C. 495.

2 Perry on Trusts, 6th ed., 1407, § 861, note (a).

Two recent cases show well what sort of concealment is necessary.

O'Brien v. *McSherry*, 222 Mass. 147.

Terry v. *Davenport*, 185 Ind. 561.

In the second of these cases the court says at page 576:

> "Such concealment must consist of more than mere silence or general declarations. There must have been some trick or artifice to prevent a discovery, or some material fact concealed by positive or affirmative act or deed . . . Statutes of limitation are applicable to constructive trusts."

See also *Jackson* v. *Jackson*, 149 Ind. 238.

It is submitted that no such concealment is alleged against these respondents. Paragraph 184 (p. 218) merely says that

an incorrect valuation of certain loans and investments was entered on the books of the bank and that this was known and approved by the directors then in office. But approval may be wholly passive and does not import any such active participation in misrepresentation as would prevent any particular director from relying upon the statute of limitations.

In paragraph 187 (p. 219) it is simply alleged that though the directors from time to time in office knew that the reports would be made up from the books of the bank and would contain the same overvaluation of the assets of the bank, they authorized the officers of the bank to make the reports in this way and took no action to have the reports show the true condition of these assets. This last allegation, of course, simply charges inaction, which is not enough and, taken with that, the allegation that the directors authorized the officers of the bank to make the reports in the way in which they would have been made anyhow and in which such reports always are made, is too general and weak an allegation to satisfy the requirements of a charge of such concealment as should prevent the statute from running.

It is submitted that the court gave all the effect to the allegations of the bill as to concealment that they were entitled to.

VII. The Court has not in its Opinion Assumed the Existence of Facts as to the Discovery of the Cause of Action and Opportunity Therefor Contrary to the Allegations of Fact in the Bill of Complaint in Paragraphs 40 and 186 or Elsewhere.

The appellant's counsel in their brief contend that the fact that the books showed what loans and investments had been made did not counteract the concealment alleged, because the impropriety of the transactions rested upon facts not appearing on the books. But the books pointed to sources of information which were as available to any person interested as to the directors. The bill does not show that these outside facts were

actively concealed and the most that can be said is that they were not disclosed. There is no allegation of any trick or artifice by which inquiry was prevented. This is not such concealment as the statute requires.

As to the discovery of the cause of action and opportunity therefor the court assumes nothing, but found in accordance with the allegations of the bill.

VIII. The Court did not Fail to Give Effect to the Law that if a Cause of Action is Once Fraudulently Concealed by the Defendants by Actual Misrepresentations, the Time Fixed by the Statute of Limitations as a Bar Does not Begin to Run as a Defense to it Until the Existence of the Cause of Action is Discovered by the Party Entitled to Enforce it.

On the contrary the court fully recognized this principle of law, the statement of which by the complainant differs hardly at all from the language of the statute, but found that the bill alleged no facts which constituted a fraudulent concealment by actual misrepresentation on the part of these respondents, and further found that the bill itself averred that the existence of the alleged cause of action was known by the continuing directors and the new directors, representing the bank, which was the person entitled to enforce it, for much more than six years before the suit was brought. The correctness of this view has been already argued in this brief.

Counsel for the appellant cite on page 16 of their brief under this assignment of error a large number of cases in which Federal courts, without any statutory proviso, have created on general equitable principles of estoppel an exception to the running of the statute of limitations in cases of self-concealing fraud or subsequent fraudulent concealment. The doctrine thus established can have no application, however, where the statute itself provides for and defines the limits of the exception.

This has been shown in cases already cited and will appear from the cases cited in this brief under the next assignment of

error, where it is shown that the statute of limitations applies, just as at law, to a suit in equity which is brought against directors of a corporation for losses incurred by reason of wrongful acts or omissions by them.

It should be noticed in passing that if the appellant should succeed in having this suit governed by the general equitable rule, laid down in the cases cited in his brief, instead of by the proviso in the Rhode Island statute, he would meet with the additional insurmountable difficulty that the cause of action will be taken as having accrued when it should have been discovered by the exercise of reasonable diligence, and that the bill must affirmatively and clearly show such diligence and show how the cause of action was finally discovered, which the present bill does not do.

Wood v. *Carpenter*, 101 U. S. 135.

He cannot rely on the statute to escape the necessity of showing due diligence and also rely on the equitable rule to escape the necessity of showing concealment.

IX. The Court did not Err in Failing to Give Effect to the Law Alleged in the Ninth Assignment of Error, Namely, "That the Time Fixed by the Statute of Limitations as a Bar Does not Begin to Run as a Defense for Directors of a National Bank Sued for Positive Acts Knowingly Done by them in Violation of their Fiduciary Duty to the Bank Until the Cause of Action is Disclosed by them, or is Discovered."

The first answer to this assignment of error is that even if there were such a law it would not help the appellant, as the bank had knowledge of the cause of action against these respondents before August 2, 1910. If this is so, it makes no difference what concealment there may have been from others. But granting for the sake of the argument that the bank as such had no knowledge of the cause of action, the decree appealed from would still stand on the finding of the court

that no such concealment by these respondents as the statute requires is shown by the bill. To escape from the effect of this finding the appellant contends for the above supposed rule of law.

The most obvious answer to this contention is that there is no such rule. The appellant's counsel cite no authorities in support of such a statement of the law. The nearest they come to it is to cite a long list of cases which they say establish by the weight of authority the doctrine that in such a case as this against directors of a national bank, they are to be treated as fiduciaries,so that, irrespective of concealment, "the statute does not begin to run until the cause of action is discovered *or should have been by the exercise of ordinary diligence.*" Attention has already been called to the fatal effect of the last part of this doctrine upon the appellant's case.

Leaving aside this objection and the one first above stated, that the bank had notice all the time, the contention for these respondents on this point is three-fold:

> 1. That the great weight of authority is against the doctrine that a director of a commercial bank is so far a fiduciary that he must be treated like a trustee of a direct trust.
>
> 2. That the doctrine applicable to fiduciaries does not apply after the fiduciary in question has ceased to be such, as the cases cited on the appellant's own brief show.
>
> 3. That the running of the statute in favor of these respondents after they ceased to be directors is not prevented by the fact that other directors, accused of knowingly authorizing the same bad loans and investments, continued for some time afterwards to constitute a majority of the board.

1. The statute of limitations applies, just as at law, to a suit in equity which is brought against directors of a corporation to recover for losses incurred by reason of wrongful acts or omissions by them which took place more than the statutory period before the bringing of the suit.

This is merely a specific application of the general rule previously discussed and some of the cases sustaining this application are as follows:

Emerson v. *Gaither*, 103 Md. 564 (*supra*).
Bent v. *Priest*, 86 Mo. 475, at 488-489.
Mason v. *Henry*, 83 Hun, 546, aff'd 152 N. Y. 529.
Pollitz v. *Wabash R. R. Co.*, 207 N. Y. 113.
Spering's Appeal, 71 Pa. St. 11.
Link v. *McLeod*, 194 Pa. St. 566, 45 Atl. 340.
Wallace v. *Lincoln Savings Bank*, 89 Tenn., 630 (*supra*).
Winston v. *Gordon*, 115 Va. 899, 80 S. E. 756.
Boyd v. *Mutual Fire Ass'n*, 116 Wis. 155 at 177 (*supra*).
Cockrill v. *Butler*, 78 Fed. 679, 86 Fed. 7.
Cockrill v. *Abeles*, 86 Fed. 505.
Cooper v. *Hill*, 94 Fed. 582, 36 C. C. A. 402.

In the first of these cases the receiver of a national bank had brought suit against directors to compel them to account for losses alleged to have been caused by their fraud, malfeasance or gross negligence in managing the affairs of the bank. The court sustained demurrers by two of the respondents on the ground that the bill showed that they had ceased to be directors more than the statutory period before the suit was brought. As to them the court says (p. 578):

> "It (the bill) was not filed until more than three years after Mr. Emerson and Mr. Walpert ceased to be directors, and hence we are not called upon to determine whether a director is entitled to the statute of limitations while he is still a director, although the act complained of may be of more than three years' standing. The authorities are not altogether uniform on this question, but we are of the opinion that those which sustain the right of a director to rely upon the statute, if he is not sued within the statutory period from the time he ceased to be a director, are in accord with substantial justice and the object of statutes of limitations. Although directors are in a sense trustees, they do not have charge of what are known as technical

> and continuing trusts. They are implied trustees, just as every agent is a trustee for his principal and bound to exercise diligence and good faith." . . . .
>
> (p. 580) "We are therefore of the opinion that those who have ceased to be directors (and that is as far as we are called upon to go in this case) are not precluded, by reason of their former relation to the bank, from relying on the statute of limitations as a bar to an action by the bank or its representative, or a stockholder, for negligence or misconduct in the discharge of their duties, either at law or in equity. Of course, such questions as when the cause of action arose, or whether the plaintiff had been kept in ignorance by the fraud of the defendant, etc., might arise as in other cases, and would be governed by circumstances."

In the second of the cases last cited a suit in equity had been brought by the receiver of an insurance company against one of its directors to recover from him some bonds which a man interested in having the company reinsure its policies with another insurance company had given to the defendant in consideration of his using his influence to induce his company to thus reinsure its policies. It is held that the defendant was a constructive trustee of the bonds for his company, but that the statute of limitations would apply in his favor.

The court says that while the directors of a corporation have the liability of agents and trustees, the statute of limitations applies as at law, but that so far as fraud is charged against them the period of limitations will run in their favor, under an express proviso in the statute, only from the time the fraud is discovered. The court then says (p. 489):

> "Much, we think, depends upon the fact whether the fraud is an open or secret one. If the substantial facts constituting the fraud were open, it is believed that the statute of limitations would have been applied at once."

Mason v. *Henry*, 152 N. Y. 529 (*supra*), was also a suit in equity by the receiver of an insolvent corporation against its directors to compel them to make good the loss caused to the corporation by their misapplication of its assets. It is held

that the plaintiff could have brought an action at law for damages. At page 535, the court says:

> "The jurisdiction of courts at law and of chancery having been concurrent, with respect to this plaintiff's cause of action, the lapse of six years, between the time when the misappropriation of funds and the acts complained of took place and the commencement of the action, was a complete bar to its maintenance."

In *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, (*supra*), it is held in a case like the one at bar that directors are not trustees in any strict sense and that the statute of limitations applies as at law. The court says at page 649:

> "Directors are not express trustees. The language of Special Judge Ingersoll in Shea v. Mabry, 1 Lea, 318, that 'directors are trustees' etc. is rhetorically sound but technically inexact. . . . At most, they are implied trustees in whose favor the statutes of limitations do run."

The suit was begun more than six years after the last act in a certain matter and, therefore, the court holds that as to any negligence on the part of the directors in that matter it was barred and this though it seems that the same directors continued in office up to various times within the statutory period. The case contains a good discussion of the liability of bank directors.

In *Boyd* v. *Mutual Fire Association*, 116 Wis. 155, (*supra*), the opinion was after a rehearing solely upon the question of the applicability of the statute of limitations to such cases and the court, after a careful discussion of the authorities on the subject, reverses the decision which it had formerly reached and holds that the statute applied.

In *Cockrill* v. *Butler*, 78 Fed. 679, (*supra*), a suit brought by the receiver of a national bank against its directors, the Circuit Court held that if an action at law had been brought, it would have come under the head of a special action of the case and that therefore the equity suit was governed by the provision of the state statute of limitations relating to such actions of the

case, which the court found to be the one-year provision. The case was reversed on appeal by the Circuit Court of Appeals of the 8th Circuit in *Cockrill* v. *Cooper*, 86 Fed. 7, but simply on the point that at the time the cause of action arose the one-year provision of the Arkansas statute of limitations no longer applied to such an action of the case as this would have been, if brought at law.

The next to the last case cited, *Cockrill* v. *Abeles*, 86 Fed. 505, is particularly interesting. It was brought against the directors of a banking corporation who continued in office until the appointment of a receiver. The bill had been dismissed by the Circuit Court solely on the ground that the cause of action was barred by the one-year statute of limitations of Arkansas. On appeal to the Circuit Court of Appeals of the 8th Circuit, it was held that the one-year period could not apply and the appellees tried to sustain the dismissal of the bill on the ground that the three-year clause of the Arkansas statute applied.

The court, however, held that this did not apply to the entire bill, as some of the acts complained of occurred within three years before the suit was filed, and therefore reversed the decision of the lower court. Judge Thayer, who wrote the principal opinion, expressly refused to decide whether the statute would apply at all but called attention to the fact that the bill alleged in substance, "that at the time of the commission of the wrongful acts in question, and afterwards, until the appointment of a receiver, the defendants who were concerned therein constituted a majority of the directors, and that, in consequence of their having full control of the corporation, no suit could be brought to redress the alleged grievance, until a receiver was appointed." He does not say that this made any difference but seems to think that perhaps it might.

Yet the other two judges who made up the court both wrote opinions in which they definitely stated that they held that the three-year statute of limitations applied to the case

and made no allusion to the circumstances referred to by Judge Thayer. Apparently his suggestion that these circumstances might prevent the statute from running did not impress them favorably.

That suggestion was made the basis of an argument by counsel for the complainant in the present case in the court below, though it was not raised by any assignment of error in the appeal from the District Court. The Circuit Court of Appeals in its opinion expressly found that there was no merit in the argument and the point involved is not raised by any assignment of error on the present appeal. Yet the appellant's counsel will probably argue it, as they have cited in their brief the cases that tend to support it. Hence it will be discussed in this brief a little later. It may be noted in passing, however, that the point is not mentioned in the case last above cited, decided a little later by the same court, the Circuit Court of Appeals for the 8th Circuit, in which the whole subject of the application of the statute of limitations is carefully discussed.

In that case, *Cooper* v. *Hill*, 94 Fed. 582, 36 C. C. A. 402, the receiver of a bank had sued its directors in equity to recover for losses alleged to have been caused by breaches of duty on their part, and the court in its opinion, written by Judge Sanborn, says at 94 Fed. 590, with regard to the relation between the directors of a bank and the corporation itself:

> "It is not an express trust arising from contract or privity, but an implied or resulting trust created by the operation of the law upon their official relation to the bank. The result is that the officers of a national bank are not trustees of an express, but of an implied, trust for the bank and its stockholders and creditors, and statutes of limitation and the doctrine of laches may be invoked in their defense. . . . But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor

> will not be bound by the statute but will determine the extraordinary case in accordance with the equities which condition it."

It is submitted that this lays down the correct rule and the one that is supported by the great weight of authority, that the statute of limitations runs in favor of the director of any ordinary business or banking corporation, who is alleged to have misapplied its funds, from the time of the acts complained of, unless by his conduct he has equitably estopped himself to claim the benefit of that statute, just as he may in like manner be estopped to claim the benefit of the statute of frauds or any other legal defense.

To some of the above cases the appellant's counsel object because they do not expressly involve the element of knowledge or lack of knowledge by the corporation. But all of them repudiate the whole basis of the rule contended for in behalf of the appellant and hold that the statute of limitations applies, *proprio vigore*, which would include any proviso like that in the Rhode Island statute.

Under this proviso mere lack of notice on the part of the corporation of the wrongful conduct of the guilty directors, or failure on their part to disclose it, is not enough to prevent the running of the statute. There must be such fraudulent concealment of the cause of action by actual misrepresentation as the statute of Rhode Island requires. That no such concealment is set forth in the bill of complaint in this case and the amendment thereto has been already shown in this brief.

In order to escape from this rule of law, the appellant's counsel rely on the above mentioned doctrine, namely, that the director of a national bank occupies such a fiduciary position that mere non-disclosure by him is enough to prevent the running of the statute until the cause of action is discovered, or should have been by the exercise of ordinary diligence, and in support thereof they cite a long list of cases on pages 20 and 21 of their brief.

Not one of these cases holds that such a rule applies where the corresponding state statute of limitations defines what sort

of concealment shall prevent the running of the statute before discovery of the cause of action. A considerable number of them are cases in which the court found the position of the directors in question to be the same as that of trustees under an express trust, in which the cause of action is purely equitable and the statute will not run at all so long as the trust relation continues. Such are the English cases cited, laying down a doctrine which has been abolished in England by statute and which is accepted in only a few of our states, is against the great weight of authority, and is not the law of Rhode Island, as has been already shown in this brief.

Three of the other cases cited, those from Massachusetts and New Jersey, are savings bank cases, which are there held to be governed by different principles from those which apply to other banks and corporations. The appellant's counsel strenuously deny that this is so, but any careful reading of the Massachusetts case, *Greenfield Savings Bank* v. *Abercrombie*, 211 Mass. 252, will show that the court holds that trustees of a savings bank under the system of that state are under a higher duty than the directors of a business corporation or commercial bank, the duty of trustees of an express trust. The court says, beginning on page 254, after mentioning the contention of the demurrants that the bill charged only want of care:

> "This they say is not sufficient; and they rely upon a large number of familiar decisions in which it has been held that the directors or managers of a business corporation conducted for profit are not to be made responsible for losses due to a mere error of judgment, where there has been an honest exercise of judgment. * * * * * (p. 255) But these and similar decisions are not applicable to the case of a savings bank under the laws of this Commonwealth. * * * * * * It is not without significance that in this statute, as in former and subsequent ones, the governing board of officers is given the name of trustees. * * (p. 256) In other words, the savings bank and its managing officers or trustees are held to the same duty as ordinary trustees of a

> direct trust. * * * * * And so are the decisions as to the trustees or managing officers of savings banks in New York and New Jersey, in which such banks are not commercial institutions having a capital stock and conducted in whole or in part for the gain of their stockholders, but occupy the same position and are intended to serve the same beneficial purposes as is the case in this Commonwealth."

In case of such banks the trustees usually constitute the corporation, holding the legal title to all its property, while the depositors are not really creditors but *cestuis que trust.*

In the fourth case, *Bent* v. *Priest*, 86 Mo. 475, the state statute expressly provided that in a case of fraud the period of limitation should run only from discovery. Concealment by actual misrepresentation was not required. Moreover, the case was one of purely equitable cognizance, as the respondent was not shown to have injured the corporation in any way, but had made a profit for himself out of his official position, of which profit he was held to be a trustee for the corporation.

In the next case, *Rankin* v. *Cooper*, 149 Fed. 1010, there was concealment by false representations and the case is important only because of what is said in the opinion about the guilty directors continuing in control of the corporation. In that connection it will be considered later. It does not support the contention for which it purports to be cited.

The next case, *National Bank of Commerce* v. *Wade*, 84 Fed. 10, was brought against managing officers, all of whom continued in control of the corporation and in that connection it will be discussed later. It is only one of two American cases in the list that really seem to stand for the proposition that directors of a national bank are to be treated like trustees of an express trust.

The next case, *Johnston* v. *Roe*, 1 Fed. 692, deals only with a time limitation regulating procedure in a probate court. The ruling is that such a regulation affects only proceedings in the state courts, of which the courts of probate are a part, and not proceedings in the federal courts. It does not deal with

general statutes of limitations, which have frequently been held applicable in later cases in higher federal courts. It lends no support to the contention for which it is cited.

In the opinion in the next case, *Huntington National Bank* v. *Huntington Distilling Co.*, 152 Fed. 240, the officer whose misconduct was involved had come into possession of property that he should have turned over to the bank and apparently affirmatively concealed that fact from the bank, in control of whose affairs he continued until his death. The case was said to be one of exclusively equitable jurisdiction and it is not suggested that the statute would not begin to run upon his death. Moreover, the court found that a very broad exception in the West Virginia statute of limitations would be applicable, if the statute should be applied at all.

It is worthy of note that in the opinion in that case the court says at page 249:

> "Briefly applying these principles touching these two defendants relied on in this case, the one laches, the other of the bar of limitations, it is only necessary to say that it was Russell's clear duty as president of the bank, to see to it that the bank lost nothing by laches or limitation in bringing an action. He knew when he did not turn over the proceeds of this brandy and of these accounts to the bank that it had a cause of action against himself therefor, and it was his duty to do one of three things, either settle his liability, *resign his directorship and presidency of the bank*, or have himself at once sued by it. He did neither, but on the contrary he concealed the assignment, took possession of the property, and diverted to other uses its proceeds. The other bank officers learned this only after his death in 1903; they allowed his administrators the year allowed by statute to settle the demand, and, when not settled, almost immediately brought this suit. Under such circumstances neither the statute of limitations nor the defense of laches can avail."

In the next case, *Emerson* v. *Gaither*, 103 Md. 564, the court held that the principles applicable were not those applicable to cases of trustees of an express trust. It refused to decide

whether a director who remained on the board within the statutory period could claim the benefit of the statute, but squarely decided that one who had ceased to be a director more than the statutory period before the suit was brought was protected by the statute except as to acts which had not resulted in clear damage to the corporation before his withdrawal. As to this exception, the case is overruled by the recent Corsicana Bank case, *Corsicana Nat'l Bank* v. *Johnson*, 251 U. S. 68 (*supra*).

The next American case cited, *Ellis* v. *Ward*, 137 Ill. 509, seems to stand for the proposition for which it is cited, but it is based on the doctrine that the assets of a corporation are a trust fund for its creditors, a doctrine which has not been adopted in Rhode Island as to the assets of a solvent corporation and has been definitely repudiated by the United States Supreme Court, except as applied to the assets of an insolvent corporation, being administered in equity.

Hollins v. *Brierfield etc. Co.*, 150 U. S. 371, 383.

This case is cited and followed in *McDonald, Receiver*, v. *Williams*, 174 U. S. 397, a suit by a receiver of a national bank to recover dividends paid entirely out of capital, while the bank was still solvent. There at page 403, after quoting from the above cases and other cases in the same court, the court says:

> "These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.
>
> "The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back."

This leaves the case of *Ellis* v. *Ward* without much basis to stand on. The only other case cited on pages 20 and 21 of

the brief for the appellant is *Brinckerhoff* v. *Roosevelt*, 143 Fed. 478, on which his counsel seem especially to rely. The discussion of the subject of the statute of limitations is quite brief and vague, it being impossible to tell upon what theory the court was proceeding in holding that the action was not barred because the wrongful conduct of the respondent was not discovered until a few months before the suit was brought. It may well have been on account of a New York statute providing, as many statutes do, that the period of limitations should not begin to run against a cause of action or suit for fraud until discovery.

There was also active concealment in the Brinckerhoff case, because the respondent caused dividends to be paid on stock of the building company until far within the period of limitations, although he had given away practically its sole valuable asset. The case is easily distinguished from the present one by the fact that, as the Circuit Court stated in its opinion (131 Fed. 955, at 961), "The defendant Roosevelt was the most influential factor in both companies, and his wishes and judgment controlled his official associates," and evidently they continued to do so until just before the suit was brought.

Counsel for the appellant on page 19 of their brief cite the case of *Exploration Co.* v. *United States*, 247 U. S. 435, 447, as deciding that the statute of limitations would not begin to run until after the discovery of the fraud, but at the end of its opinion in that case the court says (p. 449):

> "It is not our belief that Congress intended that the Government should be deprived of title to public lands by those who added to the fraud by which they were obtained, artifices which enabled them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years."

Counsel for the appellant on pages 13 and 22 of their brief cite two Rhode Island cases as deciding that mere ignorance by the plaintiff, due to non-disclosure by the defendant, will

prevent the statute from running against a cause of action for fraud.

Peck v. *Bank of America*, 16 R. I. 710.
Reynolds v. *Hennessey*, 17 R. I. 169.

Neither of them so decides, although both involved the Rhode Island statute of limitations before it contained any proviso as to concealment. The former was a case of purely equitable cognizance applying the doctrine that a corporation is in the position of a trustee for its stockholders in dealing with transfers of their stock. The latter case merely held that active additional fraud, concealing a cause of action by false representations, would prevent the statute from running.

As to the comments on the cases cited for the respondents made by the appellant's counsel on pages 23 and 24 of their brief, counsel for these respondents will leave their fairness and adequacy to the judgment of the Court after an examination of the cases. They wish only to say that they have not been able to find any holding in *Emerson* v. *Gaither* that the statute would not be a bar to those causes which had not become known to the stockholders and to say also that in *Boyd* v. *Mutual Fire Association*, 116 Wis. 155, there was the same sort of concealment as the respondents are accused of in this case, since false reports had been made to the insurance department of the state.

On page 27 of the appellant's brief it is argued that the statute ought not to be applied in this case because the receiver represents the persons to be benefited by a recovery, the stockholders to some extent, but primarily creditors, and they have not been neglectful in any way. The truth is, as already shown in this brief, that the receiver sues in the right of the bank and not in that of creditors or stockholders; that he does not represent them and that upon the allegations of the bill, it would not do him any good if he did. The question is not whether the rights of the persons to be ultimately benefited by a recovery have been barred, but whether the right of the bank

has been. The court so ruled and no assignment of error has been addressed to that ruling.

See *Hart* v. *Citizens' Nat'l Bank*, 105 Kan. 434.

On the same page it is argued that the Comptroller and the bank examiners are not so connected with the bank as to make it responsible for their negligence. It would seem to follow also that they are not so connected with the bank as to make concealment from them equivalent to concealment from it.

It is submitted that upon the authorities and upon sound principle the directors of a national bank are not to be treated like trustees of a direct trust; that the present case is governed by the Rhode Island statute of limitations and that the running of the statute was not prevented by concealment, unless that concealment was by these respondents, from the person entitled to sue, and by means of actual misrepresentation. It is submitted also that all the authorities show that the misrepresentation must have *prevented* discovery of the cause of action. It is not enough that it simply did not produce discovery of the cause of action.

2. But there is another answer to the contention that the court below erred in not giving effect to the rule that is applicable to cases of express trusts. This is that the rule does not apply even to express trustees after the trust relationship has terminated.

Even if it should be granted for the sake of the argument that the statute of limitations will not run in favor of directors while they continue in office, as trustees under an express trust, this would not prevent the cause of action from being barred as against directors who ceased to be such more than six years before the present suit was brought on August 2, 1916.

In 4 Fletcher on Corporations, 3520, § 2280, the author says:

> "When a corporate officer ceases to act as such, either because of his resignation or removal from office, or because of the insolvency of the corporation, the fiduciary relation ceases."

On pages 21 and 22 of his brief it is argued for the appellant that the director of a bank, as a fiduciary, owes it a duty to

disclose a cause of action by it against him of which he has knowledge and to cause himself to be sued thereon; that a failure to do so until the statute has run subjects him to an independent cause of action for the resulting loss to the bank; and that therefore, to avoid circuity of action, he should be prevented from setting up the statute. The argument is far-fetched at best, but at any rate such a duty on his part ends when he ceases to be a director and any cause of action against him for a prior violation of it would be itself barred by the statute in six years thereafter. He violated no duty thereafter, and his previous non-action cannot be said to be the legal cause of the bank's failure to sue him for more than six years afterwards.

Granting that a director is under such a duty, the argument may have some force as against a director who remains in office until the cause of action against him is barred, but it can have none as against one who ceased to be a director at a time more than six years before suit was brought against him and who from that time on was under no more duty to disclose a cause of action against himself than any wrongdoer is.

Even the cases cited for the appellant in support of his alleged rule as to bank directors do not go so far as to decide that the statute will not run in favor of a director who has retired from the board and in some of them the courts expressly refused so to decide.

For this reason, then, even upon the doctrine contended for by counsel for the appellant the bill should be dismissed as to these respondents, who ceased to be directors before August 2, 1910.

3. After a director who is accused of knowingly authorizing bad loans and investments has retired from the board of directors, the running of the statute of limitations in his favor is not prevented by the fact that other directors, accused of knowingly authorizing the same bad loans and investments, continue for some time afterwards to constitute a majority of the board.

The court so decided and in its opinion discusses the merits of the point clearly and convincingly (pp. 250, 251). What the appellant is really trying to do is to engraft a new exception on the Rhode Island statute of limitations. If this is to be done, the exception should be well supported by authority and clearly based on the principle of equitable estoppel. The reasoning of the court shows that it is not so based, and the authorities cited for the appellant go at most only to the extent of holding that the statute will not run in favor of guilty directors, while they themselves remain directors and are in control of the corporation. They do not establish the doctrine that the statute will not run in favor of a former director after he has retired from the board and ceased to have any control or influence over the corporation, and it is submitted that no authority goes so far.

On the other hand, in many, if not most, of the cases cited for these respondents under this assignment of error, directors who were charged with liability for participating in misapplication of their corporation's assets continued in control of the board within the statutory period, yet this did not prevent the courts from applying the statute to those acts which had taken place more than the statutory period before the suit was brought and in *Emerson* v. *Gaither*, 103 Md. 564, (*supra*), the court, while declining to pass on that broad proposition, gave the benefit of the statute to those directors who had ceased to be such more than the statutory period before the suit was brought, though their co-defendants had apparently continued in control of the board of directors for a long time afterwards.

The first case that seems to lend any support to an argument that the running of the statute should be prevented if the guilty officers continued in control of the corporation is the case of *National Bank of Commerce* v. *Wade*, 84 Fed. 10, decided in 1897 in the Circuit Court of the District of Washington and previously referred to in this brief. There the district judge, after calling attention to the fact that the defendants,

who were accused of making improper loans, were the managing officers of the bank, says (p. 15):

> "I hold that in cases of this nature the statute will not begin to run as long as the *cestui que trust* is under the control or influence of the trustee. . . . and, as this suit was commenced within three years from the time when the defendants gave up the control of the bank to their successors, it is not barred by the statute of limitations."

As to this case several things should be noted. It was the decision of a single judge sitting at *nisi prius;* the authorities cited clearly were treating only of trustees under an express trust and the language of the opinion indicates that the defendants were the *only* managing officers of the bank until less than three years before the institution of the suit. These things greatly weaken, if they do not entirely destroy, the weight of the case as an authority on this point.

It may be noticed also in passing that the case seems to recognize that the statute would begin to run as soon as the defendants ceased to be the managing officers of the bank.

The next suggestion that the running of the statute might be prevented by the continuance of the guilty directors (all of them) in control of the corporation seems to have been rather lightly thrown out by Mr. Justice Thayer in the case of *Cockrill* v. *Abeles*, 86 Fed. 505, 30 C. C. A. 223, previously discussed in this brief. He expressly refused to decide the question thus raised by him and it evidently did not favorably impress his two associates who sat on the case with him, for they held that the statute applied to the case, without even mentioning the circumstances alluded to by him.

Nor was it mentioned in the opinion in the case of *Cooper* v. *Hill*, 94 Fed. 582, decided by the same Circuit Court of Appeals, in which the extraordinary circumstances that might induce a court of equity to permit such a suit to be maintained, notwithstanding the statute, were described.

The suggestion of Judge Thayer was, however, adopted and applied, without discussion, as one of two grounds of

the decision in the case of *Rankin* v. *Cooper*, 149 Fed. 1010, (*supra*), at 1015, which was decided by a single district judge at *nisi prius* and therefore is not entitled to a great deal of weight as an authority. Even if the reasoning in support of this doctrine were sound, it hardly goes so far as to prevent the statute from running in favor of a former director after he has retired from the board and ceased to have any control or influence over the corporation, and it is submitted that no authority goes so far.

This is a very weak foundation of authority upon which to erect such a new exception to the Rhode Island statute of limitations as must be created in order to decide the above point against these respondents. It is submitted that it has no foundation in sound principle.

On sound principle then, and in view of the authorities and in view of the fact that the appellant's counsel has not cited a single case to the contrary on the precise point, it is submitted that these respondents should not be denied the benefit of the statute because their former associates as directors continued to form a majority of the board until the fall of 1911.

X. The Courts Below Rightly Decided that the Statute of Limitations Constituted a Defense for these Respondents and the Bill of Complaint was Rightly Dismissed as to Them.

No new point is presented for the appellant under his last assignment of error, but only a resumé of arguments previously made. It seems proper therefore to summarize the main points that have been urged in behalf of these respondents.

The case is governed by the Rhode Island statute of limitations and its proviso, which requires, in order to prevent the statute from beginning to run, that the existence of the cause of action be fraudulently concealed by the person liable to the action, from the person entitled to sue, and by actual misrepresentation.

There was no concealment by actual misrepresentation from the person entitled to sue, because the suit is in the right of

the bank and the bank had notice of the existence of the cause of action before August 2, 1910.

The false representation charged against these respondents is not of the kind required by the statute and the bill does not show that any representation by these respondents concealed the true state of the bank from anybody as late as August 2, 1910.

Hence the decree appealed from should be affirmed.

Respectfully submitted,

WILLIAM W. MOSS,
For the respondents
CONNLY AND WELLMAN.

PERCY W. GARDNER,
For the respondent
JOHN R. DENNIS, Administrator.

GARDNER, MOSS & HASLAM,
Attorneys for the respondents
CONNLY AND WELLMAN.

In the Supreme Court of the United States

No. 69

OCTOBER TERM, 1921

RENSSELAER L. CURTIS, Receiver,
Complainant, Appellant,

v.

JOHN J. CONNLY ET AL.,
Respondents, Appellees.

BRIEF IN BEHALF OF HENRY FLETCHER,
Respondent, Appellee.

CLAUDE R. BRANCH,
EDWARDS & ANGELL,

15 Westminster Street,
Providence, R. I.
Counsel for Henry Fletcher.

October, 1921.

SUBJECT INDEX.

INDEX OF AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES.

October Term, 1921.

No. 69.

RENSSELAER L. CURTIS, RECEIVER,
Complainant, Appellant,

v.

JOHN J. CONNLY ET AL.,
Respondents, Appellees.

BRIEF FOR HENRY FLETCHER,
Respondent, Appellee.

STATEMENT

This is an appeal from the decree of March 4, 1920, of the Circuit Court of Appeals for the First Circuit, which was unanimous in affirming the decree of the District Court of the United States for the District of Rhode Island, dismissing the bill of complaint as to six respondents, including Henry Fletcher, on their respective motions to dismiss.

The decree to dismiss the bill as to Mr. Fletcher recites (Record, pp. 238-239) that he

> "ceased to be a director of the Atlantic National Bank of Providence, R. I., more than six years before the bill of complaint in the above entitled case was filed and, on the allegations of the bill of complaint, as amended, the statute of limitations is a bar in favor of the said defendant Fletcher and on this ground

> the motion to dismiss of said defendant Fletcher is granted and the bill of complaint as amended is hereby dismissed as to said defendant Fletcher."

An adequate analysis of the bill of complaint and amendments and the travel of the case will be found in briefs filed in behalf of other appellees.

Separate briefs are being filed by several different counsel representing other appellees. Their contentions are in large part so similar to those of Mr. Fletcher that it is unnecessary and undesirable to set forth the details of argument which may be found elsewhere. It is not proposed to repeat in this brief, except in outline, what may be found in other briefs.

I.

THE COMPLAINANT IS BARRED FROM RELIEF AGAINST THIS RESPONDENT BY THE STATUTE OF LIMITATIONS.

A. The Rhode Island Statute of Limitations of six years is applicable.

The original bill of complaint was filed August 2, 1916, and Mr. Fletcher was served with a subpoena in this cause on August 15, 1916.

He was a director of the bank from January 9, 1906, to January 11, 1910. (Paragraph TENTH of Bill of Complaint, record, pp. 4-5). There is no allegation that Mr. Fletcher had any connection with the bank or its affairs after January 11, 1910, and in paragraph ONE HUNDRED AND NINETY-SECOND of the bill (p. 222 of record), it is stated

"The complainant makes no claim against any director for losses arising entirely out of loans or investments made after he ceased to be a director."

This respondent relies on the following provision of General Laws of Rhode Island (1909) Chapter 284, Section 3:

". . . all actions of the case except for words spoken and for injuries to the person, all actions of debt founded upon any contract without specialty . . . shall be commenced and sued within six years next after the cause of action shall accrue, and not after."

That this statute is applicable is shown in the discussions on this point in other briefs.

B. The exception to the Rhode Island Statute of Limitations is available only against a person who has fraudulently, by actual misrepresentation, concealed the cause of action from the party entitled to the action, and is available only up to the time when the wrongful acts should, in the exercise of due diligence, have been discovered.

To avoid the operation of the Statute of Limitations, the complainant relies on General Laws, R. I., (1909) Chap. 284, Sec. 7, which provides:

"If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed

to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence."

That the bank did before the beginning of the six-year period know of all causes of action alleged against the respondent Fletcher is shown on pp. 12-15, *infra*.

It is submitted, however, that this section of the statute does not apply to the respondent Fletcher for the following reasons:

1. Mere lack of knowledge of the existence of the cause of action does not prevent the statute from beginning to run.

See briefs of other respondents for a discussion of this point.

2. The fraudulent concealment must be in the nature of a trick or artifice purposely designed to conceal the cause of action.

See briefs of other respondents for a discussion of this point.

3. No such statement as to value as those alleged in the bill of complaint can be an "actual misrepresentation."

We are aware of no case in Rhode Island construing the words "actual misrepresentation" in the statute quoted above. Not only were the facts entirely dissimilar in the cases of

Reynolds v. *Hennessy*, 17 R. I. 169, and
Peck v. *Bank of America*, 16 R. I. 710,

(cited on pp. 4, 13, 22 of complainant's brief), but both were decided before the passage of this section, which first appears in the General Laws of 1896. No statute has been found in another state which confines the concealment sufficient to take a case out of the statute of limitations to a concealment effected "by actual misrepresentation."

In determining the meaning of this phrase it is consequently helpful to consider the principles underlying actions for deceit and the like, the basis of which is fraudulent misrepresentation, and the requisites for which would seem to be similar to the requisites for the kind of concealment prescribed by Sec. 7 of the Rhode Island statute.

It is held by the best authorities that statements in regard to such matters as the value of commercial paper, securities and the like, with whatever degree of positiveness or pretence of knowledge asserted, can be considered by the law as nothing more than expressions of opinion and cannot constitute actual misrepresentation. See, for example,

Gordon v. *Butler*, 105 U. S. 553.

Sawyer v. *Prickett*, 19 Wall. (U. S.) 146, 160.

Kimber v. *Young*, 137 Fed. 744 (C. C. A. 8th Circ.)

Ellis v. *Andrews*, 56 N. Y. 83.

Belcher v. *Costello*, 122 Mass. 189.

Deming v. *Darling*, 148 Mass. 504 (Holmes, J.)

Nash v. *Minnesota Title etc. Co.*, 159 Mass. 437.

Veasey v. *Doten*, 3 Allen 380.

Stewart v. *Potter*, 37 How. Pr. 68.

Keithley v. *Mutual Life Ins. Co.*, 271 Ill. 584.

2 Pomeroy, Equity Jurisprudence (4th Ed.), Sec. 878.

4. The allegations of concealment must show not only that the cause of action was not discovered but that due diligence was used to discover it.

For a discussion of this point, see briefs of other respondents.

5. Allegations of fraudulent concealment by actual misrepresentation must be exceedingly specific and certain.

See briefs of other respondents.

C. The Bill and Amendments do not allege any concealment by the Respondent Fletcher sufficient to place him within the above exception to the Statute of Limitations.

1. General discussion of the allegations.

Mr. Fletcher was a director of the bank from January 9, 1906, to January 11, 1910, (paragraph TENTH of Bill, record, pp. 4-5). The bill and amendments charge him with liability for various transactions during the time when he was director, but contain no intimation that in any of these transactions either he or any concern with which he was connected sought or obtained any loan or advantage. Mr. Fletcher did nothing whatever in connection with the bank after the termination of his period of office. As Anderson, J., rendering the decision of the Circuit Court of Appeals, said (p. 250) :

> ". . . . When these six defendants ceased to be directors, the bank was still solvent. The rights of no creditor had then been impaired. . . No collusion between these six defendants and the old directors or the new directors is alleged."

Mr. Fletcher is mentioned by name only in the following paragraphs of the bill of complaint and amendments:

Paragraph FIFTY-FIRST, sub-paragraph (2), (record, p. 184), charging him with liability for three specified dividends declared while he was in office;

Paragraph SIXTY-NINTH (record, pp. 198-199), charging him with thirty-seven specified loans and investments;

Paragraph ONE HUNDRED AND SIXTY-SECOND (p. 215), alleging that he with certain other directors had assets which in the aggregate exceeded the liabilities with which they are charged, so that directors later in office could have recovered from them the total amount of bad loans and investments for which the bill alleges they were responsible;

Paragraph ONE HUNDRED AND EIGHTY-NINTH (p. 220), alleging that he was one of three directors attesting to the correctness of three of the thirty-four specified reports to the Comptroller of the Currency;

Paragraph ONE HUNDRED AND NINETY-FOURTH (p. 222), stating that the total amount claimed from him, apart from interest, is $319,622.59.

It is submitted that the only actual misrepresentation referred to in the whole bill is in connection with the concealment of loans alleged in reality to have been made to the Columbus Securities Company, but to have been carried on the books in the names of various persons (paragraph TWENTY-THIRD, p. 168). But all loans made to the Columbus Securities Company and the parties referred to in paragraph TWENTY-THIRD were made after January 11, 1910, when Mr. Fletcher severed his connection with the bank. (See pp. 29-31.)

So it is obvious that these allegations cannot refer to him.

(a) *The allegations of the bill of complaint show that the bank on or before August* 3, 1910, *had knowledge of all of the alleged wrongful transactions with which Mr. Fletcher is charged.*

The allegations of the bill and amendments which are evidently relied on by counsel for the complainant to exclude this respondent from the operation of the Statute of Limitations are those in paragraphs THIRTY-EIGHTH to FORTIETH (pp. 173-174), and ONE HUNDRED AND EIGHTY-THIRD to ONE HUNDRED AND NINETY-FIRST (pp. 218-221), both inclusive. It is argued in their brief that prior to the beginning of the six-year period there was no discovery by the bank of the causes of action, and complainant's counsel seem to place great reliance upon the conclusion stated on page 7 of their brief:

> "There is nothing on which to base the finding that any of the new directors knew these facts of the former administration before August 3, 1910."

See also allegations to the same effect in Complainant's brief, pp. 5, 8, 28.

An examination of the bill of complaint, however, reveals that it distinctly charges not only that directors who were in office at the time of the alleged wrongful transactions and the alleged concealment of them knew all about these matters, but also that the new directors did at all times know all about these matters. Thus it is alleged in paragraph THIRTY-FOURTH (pp. 171-172):

"Said board of directors as such and each said member thereof at all times after January 1, 1908, could and would by the exercise of reasonable diligence, observation and inquiry have discovered, was chargeable with notice, and did in fact know that said dividends and improper, doubtful and worthless loans and investments should be immediately recalled, disposed of, converted, realized upon and charged off, and that said board of directors and each member thereof and all former members thereof who had been members thereof since June 15, 1906, were liable as aforesaid to said National Banking Association because of the making and retention of said dividends, loans, overdrafts and investments."

And paragraph ONE HUNDRED AND EIGHTY-FOURTH (p. 218) alleges:

"From January 1, 1908, until the suspension of the bank in April, 1913, although the uncertainty and worthlessness of the various items complained of was known to all of the directors at the time in office, these loans and investments were carried at their full value on the books of the bank, and this fact was known to all of the directors at the time being in office, and approved by them, with the following exceptions:"

(twenty-five items which disappeared from the accounts as assets at stated times, these items including most of those with liability for which this respondent is charged.)

See also the following paragraphs of the bill of complaint: NINETEENTH (p. 9); TWENTY-SIXTH (p. 169); TWENTY-NINTH (pp. 170-171); THIRTY-FOURTH (pp. 171-172); ONE HUNDRED AND EIGHTY-SEVENTH (pp. 219-220).

The knowledge of each of the directors of the transactions and alleged concealment and misrepresentation is alleged to be exactly the same as Mr. Fletcher's, and consequently there could have been no concealment from either those who were in office with him or those who became directors after his retirement. There is no allegation in the bill of collusion between any of the directors, and consequently the knowledge of these directors or any of them, whether in office with Mr. Fletcher or later, was knowledge of the bank and their failure to act within the statutory period should bar the present suit. Indeed one of the grounds of action against the directors is that contained in the following allegations of paragraph ONE HUNDRED AND NINETY-SECOND (pp. 221-222):

> "Each of the defendants with and notwithstanding the information and knowledge set forth in the TWENTY-SIXTH (record, p. 169) and TWENTY-NINTH (record, pp. 170-171) paragraphs of the bill of complaint . . . failed to have steps taken or action begun to obtain the repayment of items complained of loaned or invested before he became a director, or to compel the directors responsible therefor to make these items good to the bank, and the complainant claims to recover against each director on account thereof to the extent of the balances hereinbefore alleged as to each director respectively."

See also the following paragraphs of the bill: SIXTEENTH (7) (p. 8 of record); THIRTY-SEVENTH (p. 172); NINETY-SIXTH (pp. 207-208); ONE HUNDRED AND SIXTY-SECOND (p. 215).

The motions to dismiss of the directors who were on the board after the six-year period began to run were not granted (see opinion of Brown, J., in the District Court, p. 236), and hearings are now being held before a master in the case of these directors. As Brown, J., said in the opinion of the District Court (record, p. 234):

> "Even if, after the defendants resigned, a majority of the old directors remained on the board, it cannot be assumed that they acted as a unit in all subsequent transactions, regardless of the views of the new directors. Furthermore, it was within the power of those directors who were not of that majority to take action in case the majority were acting illegally or against the interests of the corporation. Directors would have no less right than other stockholders under Equity Rule 27. (Delaware & Hudson Co. *v.* Albany and Susquehanna R. R. Co., 213 U. S. 435; Doctor *v.* Harrington, 196 U. S. 579; Hopkins Fed. Equity Rules Annotated, 2d Ed., pp. 172, 176. Hodges *v.* New England Screw Co., 1 R. I. 312; Hazard *v.* Durant, 11 R. I. 195.)"

(b) *Moreover, apart from the allegations of knowledge of other directors contained in the paragraphs of the bill above referred to, it is apparent that no representation which Mr. Fletcher is charged with making*

was of such a nature as to fulfil the requirements of the exception to the Rhode Island statute.

See pp. 7-10, *supra*.

All that the allegations in these paragraphs attempt to charge is a concealment of the impairment of the surplus and capital of the bank by carrying on the books and reporting excessive valuations. There is no allegation of any incorrect enumeration or description of loans and securities which misled the Comptroller of the Currency, his examiners or other persons. If the securities had been hidden or changed, or had not been disclosed, or if false statements had been made in regard to the kind of securities held by the bank, that would have been actual misrepresentation.

The general allegations in the bill, above referred to, must even on demurrer be tempered by judicial knowledge of the matters to which they relate and also by the other allegations of the bill itself.

The allegations of the bill regarding the making of the loans and investments are those of Paragraphs SIXTEENTH (pp.7-8), TWENTIETH (pp. 9-158) and TWENTY-SIXTH (p. 169). The primary liability relied on by the complainant is negligence, not fraud. The bill states that improper loans and investments were made, but there is no allegation that this respondent (or any director except E. P. Metcalf) was actuated by any motive of personal gain. The bill does allege that "a large part or the whole of said loss" from the loans and investments complained of could have been saved by reasonably prompt action (paragraph THIRTY-SEVENTH, p. 172), but that the efforts to realize on them after the receiver took charge resulted in slight success. Of course, all loans and investments are from their nature more or less "uncertain," and

the "uncertainty" of such matters must be known to any man who is a director of any bank. The figure at which any loan or investment shall be carried on the books is necessarily one of judgment and opinion, and as has been pointed out on pp. 8-9, *supra*, no statement in regard to such a matter can be considered as an actual misrepresentation if the facts, as distinguished from the valuations, are accurately stated. The bill of complaint shows that on a number of the loans and investments which were made during the term of office of this respondent the face value was not realized. An investigation of the various items with which this respondent is charged reveals the fact that in the great majority of cases a large percentage of the face value was realized, and in many of them even more could have been realized had the persons who were subsequently in office as directors taken proper action. For analysis of these items, see pp. 21-29, *infra*.

It is, of course, much easier to determine the value of a loan or investment several years after it is made than it is before making it. And even if certain loans and investments turned out, under the change in business conditions which transpired in the years in question, to be of little value, that fact does not show that these loans and investments should have been so regarded by the directors in making up books and statements prior to the definite discovery of their value by liquidation. Variations in value are frequently only temporary.

The only allegations of the bill charging Mr. Fletcher individually with making any statements regarding the condition of the bank are those of paragraph ONE HUNDRED AND EIGHTY-NINTH (p. 220),

to the effect that on three occasions, namely, September 4, 1906, August 22, 1907, and July 15, 1908, this respondent was one of three directors attesting the correctness of reports of the bank to the Comptroller of the Currency. All that such reports purport to do is to give a summary of the books of the bank, and if they do correctly summarize the books of the bank, they cannot be said to be misrepresentations. There is no allegation that they did not correctly summarize the books.

It has been pointed out above (p. 8, *supra*) that the only kind of representation which will take the case out of the Statute of Limitations is one which necessarily precludes discovery. None of these reports signed by Mr. Fletcher could possibly have operated to "conceal" any cause of action against him for more than two or three months, for as this paragraph of the bill shows, ten similar reports, none of which Mr. Fletcher attested, were made between the time of his attesting the last of these reports, July 15, 1908, and the beginning of the period of six years before the institution of this suit. Any incorrectness in the reports attested by Mr. Fletcher was consequently discoverable by the bank officials long prior to the beginning of the six-year period. And the same is true of the book entries which it is alleged all of the directors approved.

It is not contemplated that any statement in regard to the value of loans and securities shall be of any permanent effect. One of the chief functions of the officials of a bank is to investigate loans and investments continually. A person or corporation who may be regarded as worthy of credit at one time may very well be in an entirely different position in a few weeks

or months thereafter. Most of the paper which banks take is for very short terms, and it is, of course, the duty of bank officials on each renewal to acquaint themselves with the condition of the borrower as it then exists and not rely merely on his condition as it existed or was represented to exist some weeks or months before.

An analysis of the dealings of the bank with the various borrowers, in regard to whom it is charged that this respondent made misrepresentations resulting in concealment, shows that a great majority negotiated new loans or renewals within a few months after this respondent resigned and more than six years prior to the filing of the bill of complaint. In these cases it is consequently clear that there was no actual concealment, as the matters complained of were brought clearly to the attention of the directors more than six years before suit was brought. There was no concealment from the directors who served after Mr. Fletcher's retirement, and they could and should have brought action against him within six years if the bank had any cause for action against him. Mr. Fletcher had no connection with the bank after January 11, 1910; and there is no allegation of the bill from which it can even be inferred that he took any active part in any concealment after that time. It might be argued that a director who had committed actionable wrongs prior to 1910 and who remained on the board for a period of six years thereafter should not be heard to complain that no action had been taken against him during that period. But there is no estoppel or similar principle operating against Mr. Fletcher, and according to the allegations of the bill, any mis-

representations made during his term of office did not deceive the directors who served subsequently, either new directors or those who were in office with him and continued after his retirement.

The allegation of paragraph ONE HUNDRED EIGHTY-SIXTH (p. 219), that the impairment of surplus and capital "could not be and was not discovered . . . by the Comptroller of the Currency, or his examiners" is obviously untrue and unsubstantiated.

Revised Statutes, Sec. 5240, as amended by the Act of Feb. 19, 1875, Chap. 89, and Act Dec. 23, 1913, c. 6, §21 (see U. S. Compiled Statutes, 1916, Sec. 9832) provides:

> "The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person, or persons, to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers or agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller."

Statements of value of securities made on the books were as much open to criticism and investigation by the National Bank examiner as they were by the directors, and it was the examiner's chief business to investigate the value of loans and investments and to see that they were carried on the books of the bank at their proper value. If the Comptroller of the Currency employed a bank examiner who was so incompetent that

he either did not know the value of the securities listed or how to ascertain such values, but took the statements on the books of the bank without investigation, that surely does not amount to a concealment of facts from the Comptroller or the examiner.

2. Analysis of the items with which Mr. Fletcher is charged.

Paragraph SIXTY-NINTH of the amendments to the bill of complaint (pp. 198-199), charges Mr. Fletcher with thirty seven specified improper loans and investments. Any concealment or misrepresentation with which it is sought to charge Mr. Fletcher so as to avoid the effect of the Statute of Limitations must relate to these items. Allegations regarding these items are also contained in other parts of the bill and amendments.

An examination of such allegations shows that Mr. Fletcher and the directors who were in office when he was did not fraudulently conceal the true condition of the assets of the bank. Thus it appears that many of the items in question were charged off the books as worthless more than six years before this suit was brought; in other cases that the loan or investment was necessarily the subject of fresh investigation by the directors after Mr. Fletcher's retirement and before the six-year period; and in others any overvaluation in which Mr. Fletcher participated was comparatively slight, even judged in the light of subsequent developments, as a large part of the amount outstanding at the time of Mr. Fletcher's retirement was actually collected, or could have been.

American Peat Paper Company and Trustees and Pilgrim Paper Company Trustees.

It appears from paragraph TWENTIETH (p. 76 of the record), that new loans or renewals were made to these parties on January 11, 1910, the date of Mr. Fletcher's resignation, and May 10, 1910, and that their financial standing was consequently then the subject of fresh investigation; and paragraph NINETY-SEVENTH (p. 208 of the record), alleges that the trustees to whom these loans were made "all had assets out of which these loans could have been recovered up to the year 1912 if the claims had been pressed." It also appears that these two loans were eliminated from the books as assets on August 13, 1910 (Par. 185, p. 219 of record).

George D. Baker.

This loan was eliminated from the books as an asset on April 8, 1909 (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219, of record).

A. T. Baldwin.

Loans and renewals were frequently made to this borrower (see original bill, pp. 13-18), and there were dealings with him in over twenty matters between the time of Mr. Fletcher's resignation and the beginning of the six-year period. Over $4700 was realized from this borrower after the receiver took charge (original bill, pp. 174-175), and it is alleged that had pressure been made "in the years 1910, 1911 and 1912, repayment of some part of the loans to him could have been secured" (paragraph ONE HUNDRED AND FIRST, p. 209).

M. N. Berlin & Company.

New loans were made to this concern several times in the period between Mr. Fletcher's resignation and the beginning of the six-year period (see original bill, p. 159), and the indebtedness of this borrower was reduced from $72,000 on January 1, 1910, to $17,000 in 1913 (p. 159), and over $8000 was recovered from this borrower after the receivership (pp. 174-175).

Carolina Mills Company.

It appears (p. 25) that there were new dealings with this concern in the period between Mr. Fletcher's resignation and the beginning of the six-year period. Paragraph ONE HUNDRED AND SIXTH (p. 209), alleges that this concern "always had assets up to the year 1913, and it could have been forced in the years 1910, 1911 and 1912 to have paid off more of the loans by the bank to it." It also appears that after the receivership over $8000 of the $19,000 then due was recovered (p. 175). At the time of Mr. Fletcher's resignation the balance due from this concern amounted to only $12,000 (p. 161).

Clay Products Company.

It appears (p. 170), that $1800 was invested in bonds of this corporation on June 22, 1909. All but $100 was realized on this bond, a very slight depreciation (see paragraph SIXTY-NINTH, p. 198).

Consumers Rubber Company.

Business was done continually with this borrower between the date of Mr. Fletcher's resignation and the beginning of the six-year period (see original bill, pp.

39-41). At the time of Mr. Fletcher's resignation about $40,000 was owed by this company. This was reduced to less than $5000 in 1912 (p. 159). Paragraph ONE HUNDRED AND ELEVENTH of the amendments (p. 210) alleges that "this company could up to the end of the year 1911 have been forced to reduce its loans more than it did."

Continental Finishing Company.

The bank had several dealings with this borrower between the time of Mr. Fletcher's resignation and the beginning of the six-year period (p. 59). The balance due from this concern at the time when Mr. Fletcher left office was between $10,000 and $11,000, and more than $21,000 was collected from this concern after the receivership (see pp. 162, 175). It is stated (paragraph ONE HUNDRED AND SIXTY-FIFTH, p. 216), that the balance is chiefly a demand note of October 19, 1910, at which date Mr. Fletcher was not a director.

Eastport Electric Light Company.

In 1909 the bank invested $1000 in bonds of thi company (p. 170). $631.25 was realized on the sal of them during the receivership (p. 176). This de- preciation is not greater than that of many bond generally considered perfectly good in 1909 and 191

Exeter Machine Works.

The bank invested $500 in the stock of this concer in 1909. $365.15 was received on account of it (p 170, 176). So even if Mr. Fletcher caused it to b carried at its cost value on books of the bank, it wa only a slight overvaluation.

C. W. B. Fisher.

Paragraph TWENTIETH (p. 61), which gives the time when the loans were made, does not show any loan made to this borrower before January 27, 1910. Mr. Fletcher had ceased to be a director at this time.

George B. Gifford.

Paragraph TWENTIETH (p. 63), which gives the time when the loans were made, does not show any loans made to this borrower before September 27, 1910. Mr. Fletcher had ceased to be a director at this time.

N. Goodwin Green.

It appears (p. 67), that business was done with this man in the period between Mr. Fletcher's resignation and the beginning of the six-year period.

Thomas H. Holton.

It appears (p. 69), that business was done with this man in the period between Mr. Fletcher's resignation and the beginning of the six-year period. Holton owed about $7500 at the time of Mr. Fletcher's resignation (p. 163). Holton paid over $4000 to the receiver on this account (p. 175), and it is alleged in paragraph ONE HUNDRED AND TWENTY-SECOND (p. 211), that "he could have been forced to reduce these loans somewhat more."

R. F. D. Lemon.

Most of this loan disappeared from the accounts as assets before the six-year period began (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 218).

Mollison & Dowdle.

It appears (p. 96) that there were many new loans made to this concern in the interval between Mr. Fletcher's resignation and the beginning of the six-year period. At the time of Mr. Fletcher's resignation about $20,000 was due from this concern (p. 160), and over $38,000 was collected by the receiver (p. 175). Paragraph ONE HUNDRED AND THIRTY-SECOND (p. 212), alleges, "They could have been forced to pay a substantial part of all loans made prior to the time at which the last directors who are sued took office."

James H. Morton.

Paragraph ONE HUNDRED AND THIRTY-FOURTH (p. 212), alleges, "He could have been forced up to 1912 to reduce further the loans which the bank had made to him."

Herbert S. Mott.

This item disappeared from the accounts as assets before the beginning of the six-year period (see paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219).

New England Steam Brick Company.

It appears (pp. 110-111) that many new loans were made to this concern in the period between Mr. Fletcher's resignation and the beginning of the six-year period. At the time of Mr. Fletcher's resignation it owed somewhat over $16,000, which was increased to over $30,000 in 1911 and subsequently decreased to about $2000 (p. 164). It would consequently seem that its notes might well have been worth their face value in 1910.

New York Press Brick Company.

This item disappeared from the accounts as assets on August 13, 1910, (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219).

Northern Ohio Traction & Light Company.

The bank invested $5000 in bonds of this company and the receiver received about $3600 for them (p. 176), a depreciation which is not remarkable.

Norwich & Westerly Railway Company.

This item disappeared from the accounts as assets in 1909 (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219).

Realty Company of America.

This item disappeared from the accounts as assets on August 13, 1910 (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219).

Joseph G. Robin.

Paragraph ONE HUNDRED AND FORTY-THIRD (p. 213), alleges, "Up to the middle of 1910 he could have been forced to pay this loan, but not thereafter." Consequently at the time that Mr. Fletcher resigned this loan was worth its face value, and there could have been no overstatement of its value by him.

G. Edwin Sawyer.

The bank made new loans to this borrower frequently between the time of Mr. Fletcher's resignation and the beginning of the six-year period (pp. 122-123). At the time of Mr. Fletcher's resignation Sawyer owed the bank about $6000. . This was reduced to $500 at one time in 1913 (p. 164). Consequently his notes should not have been considered as worthless.

William G. Titcomb.

The bank made new loans to this borrower between the time of Mr. Fletcher's resignation and the beginning of the six-year period (p. 137). Paragraph ONE HUNDRED AND FIFTY-THIRD (p. 214), alleges, "as late as 1912 further payments of loans to him could have been forced."

C. L. Walther and Westerly & Connecticut Railway Company.

These items disappeared from the accounts as assets in 1909 (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219).

W. E. Whittle.

$950 was deducted from the assets on this item in 1909, and the balance on December 2, 1910 (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219).

Whittle Dye Works.

This item was an investment in bonds (p. 170). The date of the maturity of the bonds seems to be nowhere stated in the bill. Paragraph ONE HUNDRED AND SIXTIETH (p. 214), states, "This borrower had assets." The item disappeared from the accounts as assets in 1911 (paragraph ONE HUNDRED AND EIGHTY-FIFTH, p. 219).

Thus it affirmatively appears that in a vast majority of the items with which Mr. Fletcher is charged and in regard to which any "misrepresentations" which he made must have been concerned, the notes or bonds did have a considerable value at the time of his

leaving office and that any depreciation from their face value which was not charged off by him was susceptible of ascertainment within a short time after his resignation and in most cases was actually ascertained soon afterwards. The above analysis shows conclusively that the broad allegations of fraudulent overvaluation are denied by other allegations in the bill itself. It is submitted that, even if the Court should feel that any particular representation as to value can constitute such misrepresentation as to take the case out of the Statute of Limitations, the bill taken as a whole fails to show fraudulent concealment on the part of this respondent.

II.

THE DECREE DISMISSING THE BILL OF COMPLAINT AS TO THE RESPONDENT FLETCHER SHOULD BE AFFIRMED.

Respectfully submitted,

CLAUDE R. BRANCH,
EDWARDS & ANGELL,

Counsel for Respondent,
HENRY FLETCHER.